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The Roberts Court and the Law of Human Resources

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This Article looks at the Roberts Court's labor and employment law cases through the lens of human resources. The rise of HR departments parallels the increase in the myriad statutory and regulatory requirements that govern the workplace. Human resources professionals carry out the day-to-day work of implementing processes designed to meet the needs of their firms in the context of this regulatory framework. In adopting an approach that is solicitous towards human resources, the Roberts Court reflects a willingness to empower these private institutional players. Even if labor and employment law scholars prefer to focus on workers' rights, rather than management's response to those rights, legal academics should nevertheless use the opportunity to develop a positive theory of HR, one that directs the HR workforce in a just and ethical manner.

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INTRODUCTION

The *sturm und drang* of contemporary workplace law is almost entirely related to litigation. In particular, issues of procedure—motions to dismiss, summary judgment, pleading standards, and class actions—take up much of the intellectual space within the field. In the employment discrimination context, the most prominent cases concern the burdens of production and persuasion,¹ the standards for mixed motive evidence,² and the availability of punitive damages and attorney’s fees.³ The Civil Rights Act of 1991 focused almost entirely on litigation-related concerns, mostly in response to prior Supreme Court decisions;⁴ similarly, the recent amendments to the Americans with Disabilities Act are also litigation-oriented.⁵ The biggest employment discrimination case of the last decade concerned the certification of a class of employees.⁶ In the ERISA context, much of the case law concerns the standards of review⁷ and the availability of certain causes of action.⁸ Further, the recent fencing back and forth about employment arbitration is largely about procedure-related issues such as class actions⁹ and the scope of arbitral review.¹⁰

1. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

2. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009).

3. *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 545 (1999) (setting forth the test for punitive damages).

4. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (providing for jury trials, compensatory damages, and a different litigation standard for disparate impact cases); *see also* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 531 (2003) (arguing that the 1991 Act “explicitly rejected” the Court’s decision in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989)).

5. Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 NW. U. L. REV. COLLOQUY 217, 218 (2008) (discussing how definitional changes will change the litigation landscape).

6. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

7. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989).

8. *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248 (2008).

9. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

10. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010).

Of course, for all this focus on litigation, most employment disputes never go to trial.¹¹ Beyond the formally settled claims lie an unknown but likely vast number of employment-related disputes that are never even filed. To deal with these disputes, and to manage the employment relationship more generally, most large employers rely on human resource professionals.¹² Human resources—or “HR”—describes the business function tasked with handling the myriad issues that arise from the dealings between employees, supervisors, management, and the firm. Although the term “human resources” originated in the 1960s, it is based on a tradition of employee management dating back to the industrial revolution.¹³ HR departments are tasked with managing the details of the employment relationship: recruitment, hiring, compensation, benefit management, training, and dispute resolution.¹⁴ Ever increasingly, the job of the HR professional is to manage legal compliance within these areas.

Despite HR’s bad reputation for enforcing needless rules, focusing on trivial matters, and having a vindictive streak against their fellow employees,¹⁵ the Supreme Court under Chief Justice John Roberts has shown a special solicitude for HR departments. The Roberts Court has recognized that most of the employment law dramas play out in the private sector well short of litigation and involvement of the courts. Given the number of employees covered, and the expanding legal standards for employees set down by employment law, it would be impossible for courts to resolve these disputes *en masse*. As a result, private actors are counted

11. It is well established that most employment claims that are filed nevertheless settle out of court. See Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 440 (2004) (stating that almost 70% of employment discrimination cases settle out of court); Minna J. Kotkin, *Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements*, 64 WASH. & LEE L. REV. 111, 135 (finding that in a dataset of 472 employment discrimination cases before a federal magistrate judge, settlement was reached prior to a dispositive motion in 87% of the cases).

12. See DAVID J. CHERRINGTON, *THE MANAGEMENT OF HUMAN RESOURCES* 5 (4th ed. 1995) (“Most companies with over 300 employees have a human resource manager.”).

13. Sanford M. Jacoby, *A Century of Human Resources Management*, in *INDUSTRIAL RELATIONS TO HUMAN RESOURCES AND BEYOND: THE EVOLVING PROCESS OF EMPLOYEE RELATIONS MANAGEMENT* 147, 148 (Bruce E. Kaufman, Richard A. Beaumont & Roy B. Helfgott eds., 2003).

14. See, e.g., SHAWN SMITH & REBECCA MAZIN, *THE HR ANSWER BOOK: AN INDISPENSABLE GUIDE FOR MANAGERS AND HUMAN RESOURCES PROFESSIONALS* xi-xii (2004).

15. See, e.g., Stewart J. Schwab, *Studying Labor Law and Human Resources in Rhode Island*, 7 ROGER WILLIAMS U. L. REV. 384, 384 (2002) (“Human-relations professionals are sometimes said to be hypocrites giving a fake smile to employees while looking solely at the bottom line.”); Keith H. Hammonds, *Why We Hate HR*, FAST COMPANY, Aug. 1, 2005, http://www.fastcompany.com/magazine/97/open_hr.html (“Why are annual performance appraisals so time-consuming—and so routinely useless? Why is HR so often a henchman for the chief financial officer, finding ever-more ingenious ways to cut benefits and hack at payroll? Why do its communications—when we can understand them at all—so often flout reality? Why are so many people processes duplicative and wasteful, creating a forest of paperwork for every minor transaction? And why does HR insist on sameness as a proxy for equity?”).

upon to do the ground-floor work of addressing workplace compliance. The Court may in fact be looking to enlist and empower this sizeable wing of HR professionals to manage workplace issues more quickly and effectively.

In so doing, the Court is following the general trend of privatization and governance reform that is alive and well in employment law. Although most employment law remains regulatory in nature, scholars and practitioners have increasingly pointed to public-private partnerships, as well as so-called self-regulation, to help overcome the enforcement gap.¹⁶ A self-governance approach has most obviously been used in the OSHA context, where the law specifically accommodates private compliance mechanisms.¹⁷ But self-governance approaches of many shapes and sizes have spread across the employment landscape. They generally seek to pair private efforts to enforce the law with some system of external accountability, whether through reconfigured governmental scrutiny or non-governmental third parties, such as NGOs or unions. The critical question about these efforts is where they fall on the spectrum: are they meaningful efforts that lead to greater compliance, or are they merely window dressing?

The Roberts Court, however, has demonstrated greater comfort with a traditional form of private regulation: namely, internal enforcement by HR and compliance departments. By enlisting private compliance actors, the Court is looking to leverage its authority across a much wider set of firms than would be possible through litigation alone. Through its holdings, its inferences, and its dicta, the Court can move these departments to enforce the law on the front lines, well before outside counsel must be called in. Litigation fades into the background. It becomes the shadow in which the actual stuff of employment law takes place.¹⁸

In the areas of employment discrimination, retaliation, privacy, and ERISA, I contend that the Roberts Court¹⁹ has focused more on the role of HR departments than on the role of litigation in enforcing employment laws. The Court's decisions have not been uniformly pro-defendant, but they have been fairly uniform in promoting the role of HR professionals and other private compliance actors in managing the enforcement of the

16. See, e.g., CYNTHIA ESTLUND, *REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION* (2010); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004).

17. Orly Lobel, *Interlocking Regulatory and Industrial Relations: The Governance of Workplace Safety*, 57 ADMIN. L. REV. 1071, 1104-15 (2005) (describing OSHA's new governance regulatory programs).

18. Cf. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

19. The Roberts Court is actually eleven justices: the current nine justices (Chief Justice Roberts, and Justices Scalia, Kennedy, Thomas, Breyer, Ginsburg, Alito, Sotomayor, and Kagan), as well as former Justices Souter and Stevens.

law. This concern for private compliance cuts across the other labels, such as “judicially modest,” “conservative,” or “pro-business,” that have been applied to the Roberts Court.²⁰

Moreover, these decisions call into question our notions about the political economy of employment law. Criminal law scholars William Stuntz and Eric Miller have questioned the resource allocation in the criminal justice system; instead of focusing on rights, they argue (to paraphrase them bluntly), we should focus on cops.²¹ The Roberts Court’s employment law decisions counsel for a similar reorientation of perspective: instead of focusing on employment law rights, we should focus on HR professionals. Like cops on the beat, HR departments can address problems at a grass-roots level. And if we assume they will always act relentlessly in the employer’s interests, we miss the opportunity to enlist them as rule enforcers in their own right.

This Article will describe the Supreme Court’s focus on human resources and inquire as to how scholars can engage with this focus in a way that will improve the lives of workers. Part I of the Article provides a background on HR management as a field and explains its role in the workplace today. Part II discusses how the Court has crafted its employment law decisions in the areas of discrimination, retaliation, privacy, and ERISA towards the HR departments that have the front-line responsibilities for administering these laws. Finally, Part III argues that the political economy of workplace regulation should be driving all participants—even progressive employment law scholars—to envision a role for HR managers and employees in carrying out the dictates of employment law in their everyday work.

I.

LAW AND THE RISE OF HUMAN RESOURCES MANAGEMENT

The workplace has long been immersed in the law. Prior to the New Deal, agency and contract law dictated the terms of the employment

20. The Roberts Court has been characterized as particularly friendly toward business. See, e.g., Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1472 (2013) (conducting a quantitative analysis to determine that “the Roberts Court is much friendlier to business than either the Burger or Rehnquist Courts”); Adam Liptak, *Corporations Find a Friend in the Supreme Court*, N.Y. TIMES, May 5, 2013, at BU1 (“The Roberts court is the most pro-business court since the mid-1930s.” (quoting Erwin Chemerinsky)); Jeffrey Rosen, *Supreme Court Inc.*, N.Y. TIMES (Magazine), Mar. 16, 2008, at 38 (“The Supreme Court term that ended last June was, by all measures, exceptionally good for American business.”). *But cf.* Lisa M. Durham Taylor, *The Pro-Employee Bent of the Roberts Court*, 79 TENN. L. REV. 803, 804 (2012) (“There is a pro-employee bent on the Roberts Court.”).

21. William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780 (2006); Eric J. Miller, *The Warren Court’s Regulatory Revolution in Criminal Procedure*, 43 CONN. L. REV. 1 (2010).

relationship, which changed from primarily year-long contracts during Blackstone's era into the "at-will" rule during the late nineteenth century.²² Federal law then imposed its own framework with statutory schemes such as the Fair Labor Standards Act ("FLSA"),²³ the National Labor Relations Act ("NLRA"),²⁴ Title VII of the 1964 Civil Rights Act ("Title VII"),²⁵ the Occupational Safety and Health Act ("OSHA"),²⁶ and the Employee Retirement and Income Security Act ("ERISA").²⁷ States have piggybacked off these regimes in areas such as antidiscrimination protections;²⁸ they have also partnered with the federal government (for unemployment insurance)²⁹ and have established their own unique protections (such as workers' compensation).³⁰ Thus, despite the at-will rule (or perhaps because of it),³¹ the workplace has become a very legally-intensive environment.

Legal education has generally broken down the law of workplace regulation into four distinct subsections: labor law, employment discrimination, employee benefits, and employment law.³² Labor law concerns the regulation of collective employee action, largely manifested through union representation.³³ Employment discrimination focuses on the federal antidiscrimination statutes, while employee benefits centers around the tax and benefits implications of ERISA.³⁴ Finally, employment law focuses on the employment contract and a grab-bag of other regulatory provisions, including FLSA, OSHA, covenants not to compete, employee

22. For a discussion of how the at-will rule developed from an early misapprehension of the actual state of the common law, see Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976).

23. 29 U.S.C. §§ 201–219 (2012).

24. *Id.* §§ 151–169 (2012).

25. 42 U.S.C. §§ 2000e–2000e-17 (2012).

26. 29 U.S.C. §§ 651–78 (2012).

27. Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 26 and 29 U.S.C.).

28. See, e.g., N.Y. EXEC. LAW § 296 (McKinney Supp. 2012) (setting forth unlawful discriminatory practices and protected classes); §§ 297-98 (reviewing the administrative and judicial processes for discrimination complaints).

29. See Charles C. Kearns, *State Implementation of the SUTA Dumping Prevention Act of 2004*, 11 ST. & LOC. TAX LAW. 105, 107-08 (2006).

30. For discussions of the creation of state workplace compensation regimes, see JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* (2004); Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, in *AMERICAN LAW AND THE CONSTITUTIONAL ORDER: HISTORICAL PERSPECTIVES* 269 (Lawrence M. Friedman & Harry N. Scheiber eds., 1978).

31. See Jeffrey M. Hirsch, *The Law of Termination: Doing More with Less*, 68 MD. L. REV. 89, 89–93 (2008) (arguing that the varied exceptions to the at-will rule have led to a confused patchwork of protections).

32. See Orly Lobel, *The Four Pillars of Work Law*, 104 MICH. L. REV. 1539, 1539 (2006).

33. *Id.*

34. *Id.*

privacy, and workers' compensation.³⁵ These subjects are the lenses through which judges, law professors, and attorneys look at the workplace.

Perhaps not surprisingly, at least three of the four subjects also represent somewhat distinct practice areas. Labor law is the realm of union-side and management-side attorneys, as well as the network of government employees and private arbitrators that work to keep the collective bargaining machinery running. However, with the percentage of union-represented workers continuing to shrink, this field is a much thinner version of its former self.³⁶ In contrast, the increase in employment discrimination suits has spurred significant growth in the plaintiff and defense bar in this area. Particularly important was the 1991 Civil Rights Act, which amped up the economic incentives for plaintiffs' attorneys to bring discrimination actions.³⁷ Employee benefits practice is an expanding niche within tax departments. Presently, however, employment law does not represent a unique and exclusive subspecialty.

Given that legal education is designed to educate attorneys, it is no surprise that the legal world has focused its conceptualization of employment law on the role of law and, more specifically, attorneys within the workplace. However, as the role of law has expanded beyond its common-law parameters, the task of interacting with the law has also expanded beyond attorneys and litigation. In fact, at the grass-roots level, HR employees are much more likely to deal with day-to-day workplace legal issues than are in-house counsels or outside law firms. Human resources, employment training, and labor relations managers and specialists held about 904,900 jobs in 2008.³⁸ And the numbers are expected to grow.³⁹

Concomitant with this growth in HR employment opportunities, human resources management has developed into an academic and professional field of endeavor.⁴⁰ Its beginnings are frequently associated with the work

35. *Id.*

36. See generally Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002) (discussing the gradual but dramatic decrease in private-sector union representation).

37. See, e.g., Susan Sturm, *Lawyers and the Practice of Workplace Equity*, 2002 WIS. L. REV. 277, 279 (noting that "[t]he 1991 amendments to the Civil Rights Act of 1964 attracted to the practice of employment law a new generation of lawyers, who approach employment litigation like personal injury cases").

38. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, RESOURCE SPECIALISTS, OCCUPATIONAL OUTLOOK HANDBOOK (2010), available at <http://www.bls.gov/oco/ocos021.htm>.

39. *Id.* ("Employment is expected to grow much faster than the average for all human resources, training, and labor relations managers and specialists occupations. . . . Overall employment is projected to grow by 22 percent between 2008 and 2018, much faster than the average for all occupations.").

40. As a recent president of the Society of Human Resource Management (SHRM) said, "Perhaps the greatest human resources accomplishment . . . has been the worldwide recognition that human resources management is, indeed, a profession with a clearly defined body of knowledge." Michael R. Losey, *Mastering the Competencies of HR Management*, 38 HUM. RESOURCES MGMT. 99, 99-100 (1999).

of Frederick Taylor, who in the late nineteenth century sought to bring “scientific management” to the industrial workplace.⁴¹ “Taylorism,” as his approach came to be called, involved breaking down workplace tasks into their smallest possible units and creating rigorous protocols for these tasks to maximize efficiency. Taylor intended for his system to eliminate conflict between workers and management by applying natural law to determine the “one best way” to address production issues.⁴²

However, HR might be better seen as a response to Taylorism—an effort to put the “human factor” back into focus.⁴³ This focus—often paired with the monikers of “human relations” or “personnel management”—agreed with Taylor’s perspective that poor management practices were ultimately at fault for the rift between management and labor.⁴⁴ Thus, it was the responsibility of management to develop programs and practices to address the workers’ needs.⁴⁵ In contrast with the “rational actor” in economics, the field of personnel management used psychology to look at workers from a social perspective.⁴⁶ The result was an outpouring of books and articles in the 1920s from psychologists and business practitioners about the needs and wants of the modern employee.⁴⁷ At the same time, thousands of companies were setting up or expanding their employment management departments to take advantage of these developments.⁴⁸ A new field was taking shape.⁴⁹

The ability of workers to organize collectively reached a crescendo in the 1930s, both through continued union growth and through federal

41. Stephen M. Bainbridge, *Privately Ordered Participatory Management: An Organizational Failures Analysis*, 23 DEL. J. CORP. L. 979, 983 (1998); see also Frederick Taylor, *A Piece Rate System, Being a Step Toward Partial Solution of the Labor Problem*, 16 TRANSACTIONS 856 (1895). Taylor was perhaps the most prominent member of the “systematic management” movement between 1880 and 1920. Jacoby, *supra* note 13, at 148.

42. BRUCE E. KAUFMAN, *THE ORIGINS & EVOLUTION OF THE FIELD OF INDUSTRIAL RELATIONS IN THE UNITED STATES* 22 (1993).

43. *Id.* at 24; see also GORDON S. WATKINS, *AN INTRODUCTION TO THE STUDY OF LABOR PROBLEMS* 476–77 (Seba Eldridge ed., 1922) (“The old scientific management failed because it was not founded upon a full appreciation of the importance of the human factor in industry. It was left for the new science of personnel management to discover and evaluate properly the human elements in production and distribution.”).

44. KAUFMAN, *supra* note 42, at 25.

45. *Id.*

46. See *id.* at 25–26.

47. *Id.* Ordway Tead and Henry Metcalf authored the first university textbook devoted to personnel management in 1920. Bruce E. Kaufman, *Evolution and Current Status of University HR Programs*, 38 HUM. RESOURCES MGMT. 103, 104 (1999).

48. *Id.* at 103; see also Jacoby, *supra* note 13, at 151 (“Between 1915 and 1920, the proportion of firms with more than 250 employees that had personnel departments increased from roughly 5 percent to about 25 percent.”).

49. See *id.* (noting that the first national conference of personnel managers attracted five hundred attendees in 1917, and close to three thousand came in 1920).

protections such as the Norris-LaGuardia Act⁵⁰ and the 1935 Wagner Act.⁵¹ Along with the rise of labor, an “institutional labor economics” (“ILE”) approach provided a new competitor to the field of personnel management.⁵² ILE advocates, found within the more general field of industrial relations, argued that collective bargaining was a crucial element to labor relations and that management practices in and of themselves were not a sufficient solution to employee relations.⁵³ This led to what has been described as a “bifurcation” in the field of workplace management.⁵⁴ Within academia, economics and industrial relations departments offered courses in labor problems that primarily focused on collective bargaining.⁵⁵ In contrast, business schools offered courses in personnel management that focused on managerial tasks such as recruitment, promotion, compensation, and training.⁵⁶ Out in practice, labor relations specialists were now working with existing personnel departments, and attorneys were often called in to negotiate and manage collective bargaining agreements.

From the post-World War II period up through the 1970s, labor relations and collective bargaining experts overshadowed their personnel management counterparts, particularly in academia.⁵⁷ Over two dozen schools developed industrial relations programs or departments, with most of these focused on ILE rather than personnel management.⁵⁸ In law, the labor law course was the only workplace-oriented class, and was taught by well-known academics such as Derek Bok, Archibald Cox, and Clyde Summers.⁵⁹ Personnel management courses remained in the curriculum of business schools, but they were generally not held in high regard.⁶⁰ In particular, critics argued that personnel management had a thin foundation in theory and was almost vocational in its approach to its subject.⁶¹

50. Ch. 90, 47 Stat. 70 (1932) (codified at 29 U.S.C. § 101 (2012)).

51. Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169).

52. Kaufman, *supra* note 47, at 104.

53. John R. Commons has been called the “exemplar” of the ILE approach. *See id.*; JOHN R. COMMONS, INDUSTRIAL GOODWILL (1919); JOHN R. COMMONS, INDUSTRIAL GOVERNMENT (1921).

54. Kaufman, *supra* note 47, at 104.

55. *See id.*

56. *Id.*

57. *Id.* at 105.

58. *Id.*

59. *See* Bernard Dunau, Book Review, 71 COLUM. L. REV. 513 (1971) (reviewing BERNARD D. MELTZER, LABOR LAW: CASES, MATERIALS, AND PROBLEMS (1970)) (discussing labor law casebooks, including those by Bok, Cox, and Summers).

60. Kaufman, *supra* note 47, at 105. The 1959 Gordon-Howell report on business schools was particularly scathing: “Next to the course on production, perhaps more educational sins have been committed in the name of personnel management than in any other required course in the business curriculum.” ROBERT A. GORDON & JAMES E. HOWELL, HIGHER EDUCATION FOR BUSINESS 189 (1959).

61. *See* Fred K. Foulkes, *The Expanding Role of the Personnel Function*, 53 HARV. BUS. REV. 71, 73 (1975).

At the same time, however, the field of human relations was booming in the workplace. The American Society for Personnel Administration was founded in 1948 with only 28 original members; by 1964, it had grown to over 3,000.⁶² The Hawthorne experiments—conducted at a Western Electric plant in the 1930s—were popularized in a 1941 *Reader's Digest* article, and served as the basis for a new approach to the study of HR.⁶³ Over time, the field both fueled and was fueled by a relationship with the behavioral sciences, particularly organizational psychology.⁶⁴ Academic research led to on-the-job developments such as vertical job loading, sensitivity training, and the managerial grid.⁶⁵ By the late 1960s, the academic focus of human resources studies had moved from economics to psychology, and from a more theoretical focus to a much more applied perspective.⁶⁶

Although collective bargaining remained the dominant workplace paradigm for academia well into the 1970s, the seeds of its downfall were planted. Union density had begun its long, steady descent. And the clutch of employment laws passed between 1964 and 1974 established the legal framework for an employment law approach, rather than a labor law approach, to workplace issues.⁶⁷ As a result, the center of gravity for most workplace issues became HR departments, rather than the collective bargaining table. Throughout the 1980s and 1990s, employers took up a variety of new HR approaches with zest: total quality management and quality of work life programs; participatory management; and diversity programs.⁶⁸ At the same time, however, the shift to a finance and shareholder-primacy focus within the boardroom forced HR departments to defend their positions by showing how the right HR policies could increase firm value.⁶⁹ The result was the growth of “strategic human resources management,” which seeks to identify ways in which HR can work with other business units to increase the firm’s overall business success.⁷⁰

62. See *Mission and History*, SOCIETY FOR HUMAN RESOURCES MANAGEMENT, <http://www.shrm.org/about/history/Pages/default.aspx> (last visited Oct. 22, 2013).

63. See F.J. Roethlisberger, *The Hawthorne Experiments*, in CLASSICS OF PERSONNEL MANAGEMENT 16–17 (Thomas H. Patten, Jr. ed., 1979).

64. Jacoby, *supra* note 13, at 158.

65. *Id.*

66. See Kaufman, *supra* note 47, at 106. See also Mitchell Langbert, *Professors, Managers, and Human Resource Education*, 39 HUM. RESOURCES MGMT. 65, 66 (2000) (“Because HRM is interdisciplinary and practice-based, human resource professors tend to be practice-oriented.”).

67. Kaufman, *supra* note 47, at 107.

68. *Id.*; Jacoby, *supra* note 13, at 164–67.

69. *Id.* at 165.

70. *Id.* For an overview of strategic human resources management as an academic approach, see Christopher Mabey, Graeme Salaman & John Storey, *Strategic Human Resource Management: The Theory of Practice and the Practice of Theory*, in STRATEGIC HUMAN RESOURCE MANAGEMENT: A READER (Christopher Mabey, Graeme Salaman & John Storey eds., 1998). The core concept of strategic

The new focus on HR strategy explains in part why the field has remained firmly ensconced in business schools and is largely missing from legal academia. Courses on HR or personnel management are now found in nearly every university with some type of business or management program.⁷¹ Despite some efforts to bring HR back into the more theoretical realm of economics,⁷² the field as a whole remains immersed in organization behavior and focused on subfields such as employee recruitment, compensation, and training.⁷³ As a result, the academic discipline is criticized for its “dearth of intellectually substantive content” in certain areas,⁷⁴ as well as “an institutional, and somewhat chatty literature.”⁷⁵ On the professional side, HR employees have struggled to establish themselves as professionals and important firm players. The field does not have the strict accreditation requirements that professions such as law, medicine, or engineering impose.⁷⁶ Moreover, while HR professionals often see themselves as part of management, they must often stand apart from management in order to perform their role properly. This division—being part of the managerial class and yet also separate from it—has led to the somewhat schizophrenic approach that the field sometimes displays.⁷⁷

Given the overlap between the mandate of HR departments and the extensive network of legal regulations for the workplace, it remains puzzling that law and HR have remained, as professions, somewhat distant cousins. While legal education has classes on the exact same laws with which HR departments must grapple, those classes are generally taught from the perspective of litigation, and they operate in isolation from similar

human resources management is that people management can be a “key source of sustained competitive advantage.” *Id.*

71. Kaufman, *supra* note 47, at 107–08.

72. One example has been the push for “personnel economics,” which applies economics principles (largely from labor economics) to HR decisions. See EDWARD P. LAZEAR, PERSONNEL ECONOMICS FOR MANAGERS 1 (1998) (“Personnel is now a science that provides detailed and unambiguous answers to the issues that trouble managers today.”).

73. Kaufman, *supra* note 47, at 108.

74. *Id.*

75. LAZEAR, *supra* note 72, at vii; see also *id.* at 1 (“Until recently, there has been no systematic discipline on which to base human resources decisions.”).

76. Jacoby, *supra* note 13, at 147 (“[P]ersonnel managers, unlike engineers or accountants, have never developed an intellectually consistent paradigm for asserting their professional legitimacy.”).

77. *Id.* at 148 (“[P]ersonnel managers are in an ambiguous social role—between employees and line managers—causing them to be distrusted by both sides.”); see also Richard A. Beaumont, Carlton D. Becker & Sydney R. Robertson, *HR Today and Tomorrow: Organizational Strategies in Global Companies*, in Kaufman, Beaumont & Helfgott, *supra* note 13, at 416 (“HR needs to work out if and when it needs to be an employee advocate, the conscience of the institution, provoker of modified managerial behaviors, a sociological soothsayer predicting the effects of external forces on business, or some combination of these.”); cf. LAZEAR, *supra* note 72, at 1 (“Human resources professional are often treated as if they were the lowest form of managerial life.”).

courses taught over at business schools.⁷⁸ And labor and employment law academics generally regard HR professionals as, at best, well-meaning but ineffectual bureaucrats or, at worst, an employer's tool for evading the spirit and/or the letter of the law.⁷⁹ On the HR side, the field does not want to conceive of itself as a mere mechanism for legal compliance. Instead, it seeks to generate its own methodological approach, while at the same time tailoring this approach to actual workplace concerns.⁸⁰ In fact, HR academics have argued that legal mandates should not be the focus of the field; rather, HR departments should take a more holistic approach that looks at potential legal ramifications as one aspect to be understood and managed.⁸¹

Both law and human resources have one important trait in common, shared with most other professions: a commitment to professional ethics within the field.⁸² Although HR lacks the equivalent of a bar to enforce rules of professional responsibility, the field is seeking to develop ethical norms and practices that will guide its membership. The Society for Human Resource Management ("SHRM"), which boasts a global membership of over 250,000 and a staff of more than 350,⁸³ has its own code of ethics relating to professional responsibility, professional development, ethical leadership, conflicts of interest, and use of information.⁸⁴ Academics have also written on HR ethics, focusing on the role of HR manager not only as a profit-maximizer but also as a professional.⁸⁵ In fact, some HR scholars have questioned whether the field's focus on the management perspective is the proper orientation, given the many stakeholders within the firm.⁸⁶ As a relatively young field, HR

78. For a discussion of the contrasting pedagogical styles between law and HR classes, see Schwab, *supra* note 15, at 385–88.

79. See Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice*, 26 FLA. ST. U. L. REV. 959, 964–65 (1999) (discussing how employers and defense lawyers may render an appearance of nondiscrimination even when discrimination is present).

80. See Kaufman, *supra* note 47, at 108.

81. Mark V. Roehling & Patrick M. Wright, *Organizationally Sensible Versus Legally-Centric Approaches to Employment Decisions*, 45 HUM. RESOURCES MGMT. 605, 606 (2006); see *id.* at 608 (defining legal-centric decision making as "decision making that does not involve legal requirements (i.e., a specific course of action is *not* strictly mandated by law) but gives primacy to legal considerations to the extent that other organizationally relevant, non-legal considerations are essentially ignored." (emphasis in original)).

82. Losey, *supra* note 40, at 100 ("[L]ike other recognized professions, human resources management has its own set of ethical standards.").

83. SOCIETY FOR HUMAN RESOURCE MANAGEMENT, *supra* note 62.

84. *Code of Ethics*, SOCIETY FOR HUMAN RESOURCES MANAGEMENT, <http://www.shrm.org/about/Pages/code-of-ethics.aspx> (last visited October 22, 2013).

85. See, e.g., HUMAN RESOURCE MANAGEMENT ETHICS (John R. Deckop ed., 2006); THE ETHICS OF HUMAN RESOURCES AND INDUSTRIAL RELATIONS (John W. Budd & James G. Scoville eds., 2005).

86. See, e.g., THE HUMAN RESOURCES REVOLUTION: WHY PUTTING PEOPLE FIRST MATTERS (Ronald J. Burke & Cary L. Cooper eds., 2006); Karen Legge, *The Morality of HRM*, in Mabe,

has the potential for a significant amount of professional growth and development.

II.

THE ROBERTS COURT'S EMPLOYMENT LAW DECISIONS

The Roberts Court has had only a brief time—roughly seven years—to make its mark on the law. But its imprint on employment law has already been fairly significant. What follows is a discussion of the Roberts Court's employment law cases in the categories of employment discrimination, retaliation, employee privacy, and ERISA. The Court has been criticized for pursuing a pro-business, pro-management agenda in its handling of these decisions.⁸⁷ However, lurking beneath this broad narrative is a more tailored claim: the Court has shown a proclivity for considering the ramifications of its decisions on HR managers, rather than solely on lawyers and litigants. The Court has demonstrated empathy for HR employees, as well as a desire to carve out more discretion and responsibility for HR within the workplace. While this perspective may be “pro-business,” it entails more nuance, and it opens a different avenue for critique of the Court's jurisprudence.

A. Discrimination

The fight against employment-related discrimination is perhaps the most important workplace initiative of the past half-century. The Roberts Court has taken up this project in earnest, receiving a significant share of criticism for failing to extend or even maintain antidiscrimination protections in a variety of contexts. This Part will examine the Roberts Court's antidiscrimination jurisprudence from the perspective of human resources and argue that the Court has endeavored to build upon and extend the HR antidiscrimination approach first begun by the Rehnquist court.

1. Rehnquist Court Foundations

Federal protections against discrimination have proven to be the most influential of the federal workplace statutory schemes. The primary federal antidiscrimination statutes are Title VII, which protects against

Salaman & Storey, *supra* note 70, at 14, 14 (“When reading accounts of HRM practice in the UK and North America, it is noticeable the extent to which the data are (literally) the voice of management.”); Mary E. Graham & Lindsay M. Tarbell, *The Importance of the Employee Perspective in the Competency Development of Human Resource Professionals*, 45 HUM. RESOURCES MGMT. 337, 338 (2006) (arguing that HR has to recognize its management-oriented focus and consider alternative stakeholder perspectives, particularly the employee perspective).

87. See, e.g., Liptak, *supra* note 20 (“[B]usinesses are free to run their operations without fear of liability for the harm they cause to consumers, employees, and people injured by their products.” (citing Arthur Miller)).

discrimination based on race, ethnicity, national origin, religion and sex;⁸⁸ the Age Discrimination in Employment Act (“ADEA”), which prohibits discrimination based on age;⁸⁹ the Americans with Disabilities Act (“ADA”), which protects disabled workers;⁹⁰ and the Equal Pay Act, which prohibits disparate compensation because of sex.⁹¹ In terms of enforcement, each of these statutes relies on private actions brought by the victims of discrimination. Section 703 of the Civil Rights Act of 1964, the prototype for antidiscrimination causes of action, supplies the primary definition of conduct rendered unlawful by the Act: “to fail or refuse to hire or to discharge . . . or otherwise to discriminate against any individual . . . because of such individual’s race, color, religion, sex, or national origin.”⁹² In order to pursue a section 703 violation, the claimant must file a charge with the Equal Employment Opportunity Commission (“EEOC”).⁹³ This filing process belies the largely individual nature of most claims, as the EEOC generally provides “right to sue” letters allowing the claimant to bring a private right of action. The EEOC does litigate a small but significant number of claims that it deems meritorious.⁹⁴ However, the vast majority of claimants must use their own resources to bring suit.⁹⁵

The 1991 Civil Rights Act transformed the world of Title VII litigation.⁹⁶ In addition to changing the standards for mixed motives cases and discriminatory impact claims, the 1991 Act provided for juries, compensatory damages, and punitive damages in Title VII cases.⁹⁷ These changes dramatically shifted the economics of potential claims. Instead of appearing before a judge to seek only back pay and reinstatement, Title VII plaintiffs could be heard by a jury and were entitled to damages for pain and suffering, emotional distress, and the malice of the defendant. The increase in potential remuneration attracted a new set of attorneys, who could build practices on these more lucrative cases.⁹⁸

88. 42 U.S.C. §§2000e–2000e-17 (2012). Section 1981 provides protections in and out of the workplace against racial discrimination. *Id.* § 1981 (2012).

89. 29 U.S.C. §§ 621–634 (2012).

90. 42 U.S.C. §§ 12101–12213 (2012).

91. 29 U.S.C. § 206(d) (2012).

92. 42 U.S.C. § 2000e-2 (2012).

93. A claimant may instead file a charge with a state civil right agency that has a “work-sharing” agreement with the EEOC under § 706(c) of the Act. *Id.* § 2000e-5; *Love v. Pullman Co.*, 404 U.S. 522, 522 (1972); *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 107 (1988).

94. *E.g.*, *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002).

95. SAMUEL ESTREICHER & MICHAEL HARPER, *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION AND EMPLOYMENT LAW* 1063 (3d ed. 2008) (“The EEOC plays no screening function.”).

96. Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of the U.S. Code).

97. 42 U.S.C. § 1977A(b) (2012) (compensatory and punitive damages); *id.* § 1977A(c) (jury trial).

98. *Sturm*, *supra* note 37, at 279.

Not surprisingly, Supreme Court decisions in the Title VII context have largely focused on litigation-oriented concerns. Considerable time and attention has been paid to fleshing out the basics of who can bring a Title VII claim, what proof is needed to survive motions to dismiss and summary judgment, and what damages can be received. The Court's decision in *McDonnell Douglas v. Green*,⁹⁹ which established the requirements for a prima facie case under Title VII, has been cited in over 41,000 cases.¹⁰⁰ However, despite the depth of precedent that the Roberts Court inherited regarding Title VII litigation, the work of doctrinal development continues, even when it comes to basic questions such as the standard of proof.¹⁰¹

Hostile work environment claims have proven particularly thorny for Title VII jurisprudence. A hostile work environment suit challenges "working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers."¹⁰² The Supreme Court did not formally affirm the claim until 1986,¹⁰³ even though it had been recognized by the Fifth Circuit fifteen years prior.¹⁰⁴ The Court then proceeded to create the outlines for these claims, building out various aspects over time.¹⁰⁵ However, basic aspects of hostile environment actions remained elusive into the 1990s.¹⁰⁶

In *Burlington Industries, Inc. v. Ellerth*¹⁰⁷ and *Faragher v. City of Boca Raton*,¹⁰⁸ the Rehnquist Court created an affirmative defense for Title VII defendants in cases alleging a hostile work environment. In both cases, supervisors subjected the plaintiffs to hostile work environments, and the Court needed to determine whether the employer was vicariously liable for the actions of its supervisors.¹⁰⁹ The Court found that liability did attach to the employer when the supervisor had immediate (or higher-up) authority over the employee. At the same time, however, the Court allowed

99. 411 U.S. 792 (1973).

100. See Westlaw Keycite search for all cases citing *McDonnell-Douglas v. Green* on March 17, 2013.

101. See, e.g., *University of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013) (holding that plaintiffs in Title VII retaliation claims must show but-for causation to prove their case); *Gross v. FBL Fin. Servs.*, 557 U.S. 167 (2009) (holding that a mixed-motives jury instruction is never proper in an ADEA case).

102. *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971).

103. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65-66 (1986).

104. *Rogers*, 454 F.2d at 234.

105. See, e.g., *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993).

106. Sharon T. Bradford, *Relief for Hostile Work Environment Discrimination: Restoring Title VII's Remedial Powers*, 99 YALE L.J. 1611, 1611 n.7 (1990) ("Courts still differ as to the precise standards for determining employer liability for hostile work environment discrimination, and much has been written on this subject.").

107. 524 U.S. 742 (1998).

108. 524 U.S. 775 (1998).

109. *Ellerth*, 524 U.S. at 754.

employers to raise an affirmative defense to such liability.¹¹⁰ In order to maintain the defense, employers needed to meet two elements: “(a) that the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”¹¹¹ In further elucidating the reasonableness standards for both employer and employee, the Court specifically referenced HR policies and procedures. Although the Court stated that an employer anti-harassment policy with a publicized complaint procedure was “not necessary in every instance as a matter of law,” the Court found that the debate over the employer’s care revolves around “the need for a stated policy suitable to the employment circumstances.”¹¹² Similarly, an employee’s failure to utilize a complaint procedure provided by the employer may not have been dispositive, but “a demonstration of such failure will normally suffice to satisfy the employer’s burden under the second element of the defense.”¹¹³

Faragher and *Ellerth* provided the cornerstone for a new HR-oriented approach to hostile environment disputes.¹¹⁴ The Court’s *Faragher* opinion specifically justified the new employer defense as a way of addressing sexual and racial harassment outside of the litigation process:

Although Title VII seeks to make persons whole for injuries suffered on account of unlawful employment discrimination, its primary objective, like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm. As long ago as 1980, the EEOC, charged with the enforcement of Title VII, adopted regulations advising employers to “take all steps necessary to prevent sexual harassment from occurring, such as . . . informing employees of their right to raise and how to raise the issue of harassment,” and in 1990 the EEOC issued a policy statement enjoining employers to establish a complaint procedure “designed to encourage victims of harassment to come forward [without requiring] a victim to complain first to the offending supervisor.” It would therefore implement clear statutory policy and complement the Government’s Title VII enforcement efforts to recognize the employer’s affirmative obligation to prevent violations and give credit here to employers who make reasonable efforts to discharge

110. *Id.* at 765.

111. *Id.*; *Faragher*, 524 U.S. at 807.

112. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807–08.

113. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807–08.

114. See Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form over Substance in Sexual Harassment Law*, 26 HARV. WOMEN’S L.J. 3, 17–18 (2003) (noting that “[i]n]ews of the *Faragher* and *Ellerth* decisions spread quickly through the world of human resources” and “human resources consultants found themselves in high demand”).

their duty. Indeed, a theory of vicarious liability for misuse of supervisory power would be at odds with the statutory policy if it failed to provide employers with some such incentive.¹¹⁵

Faragher and *Ellerth* thus marked an explicit doctrinal structure tailored toward the HR machinery existing within many workplaces. By providing guidance on how to manage hostile workplace and harassment complaints internally, the Court contemplated a system of private enforcement that would precede and shape the litigation process. Employers would have an incentive to create such processes, and employees would benefit from having their claims resolved earlier and with less time and expense.

2. Antidiscrimination Claims and the Roberts Court

The Rehnquist Court's *Faragher* and *Ellerth* decisions blazed the trail for the Roberts Court to follow in tailoring its approach to employment discrimination to HR departments. As explored further below, the cases reflect that the Court shares many of the same goals as well as biases of HR professionals. These cases are among the most controversial of the Roberts Court's tenure. They reflect a worldview that discrimination is best handled in house, rather than at the courthouse.¹¹⁶

In *Ricci v. DeStefano*,¹¹⁷ the Court dealt with an intriguing set of facts, in which one side's faith in fair process was set against the other side's concern with unjust results. The case involved firefighters – a profession with a sterling reputation for acting in the public good, but also an ugly history of racial exclusion.¹¹⁸ Justice Sotomayor—who came up for confirmation to the Court directly after the decision—participated in the *per curiam* Second Circuit opinion that the Court overturned.¹¹⁹ Despite its notoriety as a case involving reverse discrimination claims, however, the Court's opinion in *Ricci* arguably turns on a more limited inquiry: namely, the proper way to judge the results of promotional examinations after the fact.¹²⁰ As discussed below, the Court's holding follows from the respect it accorded to the initial examination as created and administered by HR professionals.

115. *Faragher*, 524 U.S. at 805–06 (citations omitted).

116. See also Matt Bodie, *Workplace Rules*, Room for Debate, N.Y. TIMES, June 21, 2011, <http://www.nytimes.com/roomfordebate/2011/06/20/a-death-blow-to-class-action/leaving-it-to-the-workplace>.

117. 557 U.S. 557 (2009).

118. *Id.* at 609 (Ginsburg, J., dissenting) (“Firefighting is a profession in which the legacy of racial discrimination casts an especially long shadow.”).

119. *Ricci v. DeStefano*, 530 F.3d 87 (2d Cir. 2008) (*per curiam*).

120. *Ricci*, 557 U.S. at 585.

In *Ricci*, white firefighters and one Hispanic firefighter sued New Haven and its officials, alleging that the city violated Title VII by refusing to certify results of promotional examination and promote the top-scoring test-takers accordingly.¹²¹ New Haven commissioned the examination in order to create a pool of potential candidates for the rank of lieutenant and captain.¹²² The city paid Industrial/Organizational Solutions, Inc. (“IOS”), an HR consulting company, \$100,000 to create the test.¹²³ The Court described the process used to develop and evaluate the test in some detail.¹²⁴ The Court discussed how IOS studied the firefighters’ jobs by interviewing current lieutenants and captains and by riding along with on-duty officers¹²⁵ and described how IOS produced the multiple choice and oral examinations based on an extensive set of training materials as well as job-analysis studies.¹²⁶ In its explication of the examination process, the Court emphasized that the materials were designed to be free from racially discriminatory impacts.¹²⁷

The tests were challenged after white and Hispanic candidates, but no African-American candidates, qualified for the next set of available positions.¹²⁸ After a series of meetings and testimony from a variety of perspectives, the City’s civil service review board voted not to certify the results of the test, because of its concern about the discriminatory impact of the test results. It argued that had the results been certified, African-American firefighters could have sued the city for violating Title VII’s prohibition on hiring decisions with a discriminatory impact.¹²⁹ However, the white and Hispanic firefighters who had been in line for promotion based on the test results sued on these grounds, arguing that the City’s refusal to certify the test was discriminatory treatment under Title VII.¹³⁰

121. *Id.* at 562–63.

122. *Id.* at 563.

123. *Id.* at 564.

124. *Id.* at 565–66 (“IOS assembled a pool of 30 assessors who were superior in rank to the positions being tested. . . . IOS trained the panelists for several hours on the day before it administered the examinations, teaching them how to score the candidates’ responses consistently using checklists of desired criteria.”).

125. *Id.* at 564–65 (“IOS representatives interviewed incumbent captains and lieutenants and their supervisors. They rode with and observed other on-duty officers. Using information from those interviews and ride-alongs, IOS wrote job-analysis questionnaires and administered them to most of the incumbent battalion chiefs, captains, and lieutenants in the Department.”).

126. *Id.* at 565 (“For each test, IOS compiled a list of training manuals, Department procedures, and other materials to use as sources for the test questions.”).

127. *Id.* at 565–66 (noting that IOS “oversampled minority firefighters to ensure that the results . . . would not unintentionally favor white candidates” and “sixty-six percent of the [evaluation] panelists were minorities, and each of the nine three-member assessment panels contained two minority members”).

128. *Id.* at 566.

129. 42 U.S.C. § 2000e-2(k) (2012).

130. *Ricci*, 557 U.S. at 562–63.

The Court agreed. It held that “race-based action like the City’s in this case is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute.”¹³¹ Finding that New Haven did not have a strong basis, the Court held the city had violated Title VII.

New Haven’s predicament draws forth some sympathy, regardless of one’s opinion on the test certification issue.¹³² Neither option—keeping the test or rejecting it—seems ideal, and the City spent significant time and expense to avoid a result like the one the test produced. And facially, at least, the City had a statistical basis for concern that the test had a discriminatory impact. Arguably, a Court predisposed to HR discretion would have given the City room to maneuver here. In fact, that is what the Society for Human Resources Management (SHRM) argued in its amicus brief:

SHRM and its members wish to maintain the flexibility in existing law that allows employers and other test users significant discretion in deciding how best to address disparate-impact issues: whether to proceed with a given selection procedure subject to completion of the validation process; whether to modify expected uses so as to ensure that scoring and ranking of scores are valid and fair; or whether to substitute a different selection process with a lesser disparate impact on particular groups.¹³³

In order to preserve this flexibility, argued SHRM, the Court needed to find the City’s decision to be within the discretion provided by Title VII.¹³⁴

Instead, the Court held that New Haven violated Title VII’s discriminatory intent prohibition, because it lacked a strong basis in evidence to believe that going forward with the test results would violate Title VII’s disparate impact provision. In so doing, the Court sets up a Scylla-and-Charibdis scenario for future employers: keep the test scores and risk a disparate impact claim, or throw them out and risk a disparate treatment claim.¹³⁵ A court that was simply pro-business or intent on

131. *Id.* at 563.

132. *Id.* at 644 (Ginsburg, J., dissenting) (stating that this case “present[s] an unfortunate situation . . .”); Luke Appling, *Recent Development*, Ricci v. DeStefano, 45 HARV. C.R.-C.L. L. REV. 147, 147 (2010) (“In March 2004, the City of New Haven, Connecticut faced a difficult choice.”).

133. Brief of the Society for Human Resource Management as Amicus Curiae in Support of Respondents at 1, Ricci v. DeStefano, 557 U.S. 557 (2009) (Nos. 07–1428, 08–328) [hereinafter SHRM Ricci Amicus Brief].

134. *Id.*

135. Ricci, 557 U.S. at 629 (Ginsburg, J., dissenting) (“The strong-basis-in-evidence standard, however, as barely described in general, and cavalierly applied in this litigation, makes voluntary compliance a hazardous venture.”; see also *id.* (noting “the discordance of the Court’s opinion with the voluntary compliance ideal”).

voluntary compliance would not have ruled this way; it would have instead given employers wide berth to conduct their own analyses and make decisions based on those analyses. Despite SHRM's argument to the contrary, however, *Ricci*'s holding for the plaintiffs is not an anti-HR opinion. In fact, the *Ricci* decision is most legitimately justified as an effort to protect HR efforts in the areas of promotion and testing.

The Court in *Ricci* established two alternative paths for finding a strong basis in evidence for discriminatory impact liability under Title VII. The employer may either have a strong basis in evidence to believe that examinations were neither job-related nor consistent with business necessity, or it may have a strong basis in evidence to believe there existed an equally valid, less-discriminatory alternative to the examinations.¹³⁶ In a somewhat surprising move, the Court did not remand to the lower courts to determine whether New Haven met either of these standards; instead, it ruled that the City failed to do so and thus was in violation.¹³⁷ The Court based its determination on its support for the time, resources, and care that the City spent in crafting the examinations in the first place.¹³⁸

According to the Court, there was "no genuine dispute" that the examinations were job-related and consistent with business necessity. The Court noted that the examinations were based on IOS's "painstaking analyses" of the officer positions as gleaned through source material and direct observation.¹³⁹ Although some candidates complained about certain questions, these complaints were reviewed and, in one case, acted upon.¹⁴⁰ Further, the City never requested from IOS the follow-up report analyzing the validity of the results, although the report was part of the contract.¹⁴¹ All of these factors pointed to the reasonable and good-faith efforts of IOS and the HR consultants who managed the testing process. To the extent that throwing the test out was an indictment of IOS's work, the Court found that such an indictment would be completely unjustified.

The Court then rejected arguments that alternative and superior testing instruments were available. Critics of the test argued that the oral portion of the exam should have been more heavily weighted, that the City could have interpreted its internal procedures differently, and that an alternative testing method such as an "assessment center process" would have produced more reliable results.¹⁴² The Court, however, rejected these

136. *Id.* at 587 (majority opinion).

137. *Id.* at 631 (Ginsburg, J., dissenting) ("When this Court formulates a new legal rule, the ordinary course is to remand and allow the lower courts to apply the rule in the first instance.").

138. *Id.* at 589-92 (majority opinion).

139. *Id.* at 588.

140. *Id.* (the Court also noted that an outside advisor "suspect[ed] that some of the criticisms . . . [leveled] by candidates were not valid").

141. *Id.* at 589.

142. *Id.* at 589-92.

alternatives as *ex post* efforts to rejigger the outcome without proof that they would in fact be better testing instruments.¹⁴³ The Court was particularly dismissive of the alternative testing method evidence because a direct competitor provided it to IOS.¹⁴⁴ The competitor's witness admitted that he had not studied IOS's examination in detail, and even praised it at points.¹⁴⁵ The witness also made it clear that he was angling for future work; in fact, the competitor ended up getting significant business from the City after it had rejected IOS's efforts.¹⁴⁶ Such mixed testimony was insufficient, in the Court's eyes, to create an issue of material fact.

The Court did not say that race could not play a role in the creation of a testing instrument. New Haven and IOS were concerned about racial disparity and undertook efforts to redress any racial imbalance within the examination at the outset, efforts that the Court did not criticize.¹⁴⁷ As the Court stated, "Title VII does not prohibit an employer from considering, before administering a test or practice, how to design that test or practice in order to provide a fair opportunity for all individuals, regardless of their race."¹⁴⁸ However, the Court also made clear that once the test has been administered, it cannot be second-guessed. Only a strong basis to believe that the test was ill-designed, or that there were better alternatives available, would allow for the test results to be ignored.

Thus, a decision that initially seems to constrict employer flexibility is instead one designed to provide for HR certainty. The Court's opinion front-loads the review process for the examination and thereby creates more certainty in the final results. It protects the reasonable and good-faith efforts of HR professionals from ongoing, after-the-fact debates about the validity of the mechanism. It is a pro-HR decision in that it seeks to insulate HR business judgment from *ex post* scrutiny. Although the Court held New Haven liable in this instance, it perhaps intended *Ricci* to embolden future employers to stick with their tests and thereby give such tests more credibility going forward. The *Ricci* test does have some flexibility and ambiguity, in that a "strong basis" does not mean certain liability.¹⁴⁹ But in the narrative of the Court's opinion, the most trustworthy player was IOS. *Ricci* reasserts the role of HR professionals in managing the hiring and promotion process,¹⁵⁰ and it gives such professionals

143. *Id.*

144. *Id.* at 591–92.

145. *Id.*

146. *Id.*

147. *Id.* at 565–66.

148. *Id.* at 585.

149. *Id.* at 581 (rejecting the rule that "an employer in fact must be in violation of the disparate-impact provision" because such a rule would "bring compliance efforts to a near standstill").

150. Interestingly, the SHRM amicus brief does not discuss the development of the test in its Statement of the Case, nor does it ever mention IOS by name. See SHRM *Ricci* Amicus Brief, *supra*

deference in doing their jobs. By holding New Haven liable for rejecting its test after the fact, the Court sent a signal: in HR we trust, and so should you.

Echoing this premise, the majority's decision in *Wal-Mart Stores, Inc. v. Dukes*¹⁵¹ is the flip side of that trust: namely, distrust in the courts. The *Dukes* case involved a Title VII class action brought by three named plaintiffs on behalf of 1.5 million female employees and former employees of Wal-Mart stores across the country.¹⁵² At issue was Wal-Mart's system of supervision, including the structure of pay and promotion decisions, which the Court's opinion (and Wal-Mart itself) describes as highly discretionary at the grassroots level.¹⁵³ In terms of pay decisions, lower-level managers had discretion to set pay within certain ranges, while higher-level executives set the ranges for managers and other salaried employees.¹⁵⁴ Promotions were also made at lower levels. Although admission to Wal-Mart's management training system did require that certain objective factors be met, such as above-average performance ratings and a willingness to relocate, managers had significant discretion in selecting candidates for training and for promotions beyond the program.¹⁵⁵ It is this common personnel practice—namely, discretion over pay and promotion at lower levels—that plaintiffs alleged as the common factor that created the discrimination against the class.

The *Dukes* Court was unanimous in rejecting the lower court's class action certification as a Rule 23(b)(2) class.¹⁵⁶ However, the four dissenters would have given the plaintiffs leave to re-plead their action as a Rule 23(b)(3) class action,¹⁵⁷ while the majority also rejected the certification for failing to meet the commonality requirement in Rule 23(a)(2).¹⁵⁸ According to the majority, it was possible that some number—possibly even a large number—of female Wal-Mart employees had individual Title VII claims based on their mistreatment at the hands of a particular supervisor.¹⁵⁹ However, for the claims to be triable as a class action, the plaintiffs had to share a “common contention” that was “of such a nature that it [was] capable of classwide resolution.”¹⁶⁰ As the majority pointed out, “[h]ere

note 133, at 23. Instead, it argues that the City should have the right to question the test after the fact, particularly if the City follows the Uniform Guidelines on Employee Selection Procedures promulgated by the EEOC. *Id.* at 13–18.

151. 131 S. Ct. 2541 (2011).

152. *Id.* at 2547.

153. *Id.*

154. *Id.*

155. *Id.*

156. *See id.* at 2557; *id.* at 2561 (Ginsburg, J., concurring in part and dissenting in part).

157. *Id.* at 2561 (Ginsburg, J., concurring in part and dissenting in part).

158. *Id.* at 2550–57 (majority opinion).

159. *Id.* at 2556.

160. *Id.* at 2551.

respondents wish to sue about literally millions of employment decisions at once. Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*."¹⁶¹ In order for the class action to proceed, held the majority, the discretionary system in and of itself had to be the common answer to this question.

The dissent accepted the notion that a policy of great discretion on the part of lower-level supervisors could itself be the root cause of discrimination.¹⁶² That discretion was allegedly warped, in part, because most managers were men and thus would be more likely to choose men for promotion and higher pay, and because the corporate culture was suffused with sexism.¹⁶³ The dissent summarized its position in this way: "Wal-Mart's delegation of discretion over pay and promotions is a policy uniform throughout all stores. The very nature of discretion is that people will exercise it in various ways. A system of delegated discretion . . . is a practice actionable under Title VII when it produces discriminatory outcomes."¹⁶⁴

However, the majority rejected the dissent's approach, criticizing it for giving the plaintiff's case too much credence. The majority opinion found the plaintiff's anecdotal evidence to be far too thin to support a class-based inference of discrimination.¹⁶⁵ It rejected the statistical evidence as insufficient to prove discrimination against the members of the class.¹⁶⁶ And it also rejected plaintiffs' sociological evidence that Wal-Mart had a "strong corporate culture" that rendered it "vulnerable" to gender bias.¹⁶⁷ According to the majority, it could "safely disregard" this testimony once the sociologist conceded that he did not have any way to quantify the impact of this culture on actual employment decisions.¹⁶⁸

Although this analysis works through a procedural issue, it also illustrates that the Court considered, at least superficially, the merits of plaintiffs' case. The dissenters argued that the majority labeled its concerns as "commonality" issues when they were actually issues for consideration under Rule 23(b)(3).¹⁶⁹ In either case, the plaintiffs facially had the makings of a certifiable class action: a common employee management

161. *Id.* at 2552 (emphasis in original).

162. *Id.* at 2563–64 (Ginsburg, J., concurring in part and dissenting in part).

163. *Id.* at 2562–63.

164. *Id.* at 2567.

165. *Id.* at 2556 (majority opinion).

166. *Id.* at 2555–56.

167. *Id.* at 2553–54.

168. *Id.* at 2554.

169. *Id.* at 2565–66 (Ginsburg, J., concurring in part and dissenting in part).

system plus significantly lopsided statistics that disfavor a suspect group satisfies the threshold requirements for a Title VII class action. And indeed, the majority could not gainsay the fact that a purely discretionary system might be a vehicle for discrimination. But the five justices could, however, require the plaintiffs to show just exactly how that discretion was warped in a particular case. The Court stated:

To be sure, we have recognized that, “in appropriate cases,” giving discretion to lower-level supervisors can be the basis of Title VII liability under a disparate-impact theory—since an employer’s undisciplined system of subjective decisionmaking can have precisely the same effects as a system pervaded by impermissible intentional discrimination. . . . But the recognition that this type of Title VII claim “can” exist does not lead to the conclusion that every employee in a company using a system of discretion has such a claim in common. To the contrary, left to their own devices most managers in any corporation—and surely most managers in a corporation that forbids sex discrimination—would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all. Others may choose to reward various attributes that produce disparate impact—such as scores on general aptitude tests or educational achievements. . . . And still other managers may be guilty of intentional discrimination that produces a sex-based disparity. In such a company, demonstrating the invalidity of one manager’s use of discretion will do nothing to demonstrate the invalidity of another’s. A party seeking to certify a nationwide class will be unable to show that all the employees’ Title VII claims will in fact depend on the answers to common questions.¹⁷⁰

This passage hits at the crux of the Court’s theory of the case: discretion itself cannot be enough to establish a Title VII claim; instead, there must be some discriminatory inference strong enough to extend across the individual actions at issue or (as in this case) the actions relating to a class of plaintiffs. And that is because, according to the majority, “left to their own devices most managers in any corporation—and surely most managers in a corporation that forbids sex discrimination—would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all.”¹⁷¹ And yet in *Dukes*, there was a disparity: women filled 70 percent of the hourly jobs in Wal-Mart stores,

170. *Id.* at 2554.

171. *Id.*

but they made up only 33 percent of management employees.¹⁷² The Court consigns this disparity to the realm of individual employment decisions.

The Court's defense of discretion, even in the face of disparity and limited but noxious anecdotal evidence, has larger ramifications. By protecting the role of discretion in personnel decision-making, the Court preserved Wal-Mart's approach to HR management against class-action attack. This position echoes the SHRM amicus brief, which argued that individualized decision-making programs reflected sound HR practices.¹⁷³ More importantly, the Court affirmed the notion that, even in the face of anecdotal and statistical evidence to the contrary, the bad faith of individual managers cannot be presumed. Instead, the opinion assumes that discretion will be used appropriately until proven otherwise.

Interestingly, Justice Scalia expressed greater skepticism about supervisors' intentions in *Staub v. Proctor Hospital*.¹⁷⁴ In *Staub*, the Court examined the "cat's paw" doctrine in the context of the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA").¹⁷⁵ The "cat's paw" doctrine, which is derived from an Aesop's fable, refers to the situation in which an employee is technically fired by a supervisor or manager who does not have discriminatory animus, but the termination is based on the testimony or actions of another supervisor or manager who does have the requisite animus.¹⁷⁶ The plaintiff alleged that a lower-level supervisor wanted the plaintiff to be fired based on his military service, and that this supervisor conducted a campaign that ultimately led to the plaintiff's termination on trumped-up grounds.¹⁷⁷ The Seventh Circuit held against the plaintiff, imposing a very high threshold for success under a cat's paw theory.¹⁷⁸

On appeal, however, the Court adopted a more forgiving standard.¹⁷⁹ The opinion is notable for its unwillingness to allow the employer to free-

172. *Id.* at 2563 (Ginsburg, J., concurring in part and dissenting in part).

173. Brief of Amici Curiae Society for Human Resource Management and HR Policy Association in Support of Petitioner at 8, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (No. 10-277) [hereinafter SHRM *Dukes* Amicus Brief]. SHRM also noted that "certifying a massive class without even considering the impact of Wal-Mart's diversity policies on its culture and decision-making" would "underestimate[] the value of such programs and weaken[] the incentives to create or maintain voluntary diversity programs." *Id.*

174. 131 S. Ct. 1186 (2011).

175. 38 U.S.C. §§ 4301-4335 (2012). USERRA prohibits discrimination against servicemen and women in employment.

176. *Staub*, 131 S. Ct. at 1190 & n. 1.

177. *Id.* at 1189-90.

178. *Id.* at 1190 (noting that "under Seventh Circuit precedent, a 'cat's paw' case could not succeed unless the nondecisionmaker exercised such 'singular influence' over the decisionmaker that the decision to terminate was the product of 'blind reliance'").

179. *Id.* at 1194 (holding that "if a supervisor performs an act motivated by antimilitary animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate

ride on its own ignorance. It is not enough, said the majority, that the employer conducted an independent investigation into the matter.¹⁸⁰ As the Court explains, “if the employer’s investigation results in an adverse action for reasons unrelated to the supervisor’s original biased action . . . , then the employer will not be liable. But the supervisor’s biased report may remain a causal factor if the independent investigation takes it into account without determining that the adverse action was, apart from the supervisor’s recommendation, entirely justified.”¹⁸¹ In both *Dukes* and *Staub*, employers are given the flexibility to handle their matters independently; however, *Staub* takes a more jaundiced (and, perhaps, realistic) view of how seemingly independent actions can still allow for discriminatory outcomes. The difference may be based, in part, on the role of competent HR departments in resolving the issue. The *Staub* employer seemed to have dropped the ball by allowing a poor HR investigation to mask evidence of anti-service-person animus.¹⁸² In contrast, the *Dukes* plaintiffs wanted to indict an entire company’s HR methodology on the basis of statistics, limited anecdotes, and sociological theory. *Staub* is reinforcing good HR techniques in individual cases; *Dukes* is creating room for seemingly neutral HR methods to operate on a national level.

The Roberts Court reached its employment-law nadir, according to many, in *Ledbetter v. Goodyear Tire & Rubber Co.*¹⁸³ *Ledbetter*’s crabbed and parsimonious reading of Title VII’s statute of limitations was soundly rejected by Congress in subsequent legislation,¹⁸⁴ and the plaintiff became a celebrity in the aftermath.¹⁸⁵ The Court’s holding—that plaintiffs are responsible for determining if their pay is discriminatory, even if they have no idea about the discrimination¹⁸⁶—seems to reflect a tin-eared approach to the underlying problem. There is such an obvious objection to the impracticality of the Court’s holding that even legal laity had grounds to object. Why would the Court put itself in such a controversial position? The decision was decidedly pro-employer, conservative, and anti-litigation. And perhaps these labels tell the entire story. But once again, the Court appears to be looking at the case not through the eyes of plaintiff Lilly Ledbetter, but through the eyes of HR departments. And the outcome looks less objectionable through that lens.

cause of the ultimate employment action, then the employer is liable under USERRA” (emphasis in original)).

180. *Id.* at 1193.

181. *Id.*

182. *Id.* at 1189–90 (discussing investigation).

183. 550 U.S. 618 (2007).

184. Lilly Ledbetter Fair Pay Act of 2009, 42 U.S.C. § 2000e-5 (2012).

185. Gail Collins, *Lilly’s Big Day*, N.Y. TIMES, Jan. 28, 2009, at A27.

186. *Ledbetter*, 550 U.S. at 642–43 (rejecting Ledbetter’s claim that pay claims were more difficult to detect).

Ledbetter worked at Goodyear for almost twenty years.¹⁸⁷ Over time, her pay fell off in comparison with her cohort of managers, who were all men.¹⁸⁸ At the end of her employ, Ledbetter made roughly \$3700 a month, compared with a range of \$4200 to \$5200 for her comparable colleagues.¹⁸⁹ Ledbetter had no sense of this disparity, however, until she took early retirement.¹⁹⁰ The average person can sympathize (or even empathize) with Ledbetter's anger and sense of betrayal at finding out about the large difference in pay. Moreover, it is easy to understand why she did not know about it. As Justice Ginsburg related, in dissent:

Comparative pay information, moreover, is often hidden from the employee's view. Employers may keep under wraps the pay differentials maintained among supervisors, no less the reasons for those differentials. Small initial discrepancies may not be seen as meet for a federal case, particularly when the employee, trying to succeed in a nontraditional environment, is averse to making waves.¹⁹¹

The Court's decision, written by Justice Alito, spends very little time on the facts.¹⁹² The Court was fairly narrow and doctrinal in its analysis, citing to the concept of "discrete discriminatory acts" as triggering the time limits for filing an EEOC charge.¹⁹³ In justifying the decision on policy grounds, the Court pointed to the usual justifications for statutes of limitations: the need for prompt resolution of disputes, the staleness of evidence over time, and the desire for finality.¹⁹⁴ As the Court noted, the 180-day EEOC charging deadline is "short by any measure," and it reflects an intention to "encourage the prompt processing of all charges of employment discrimination."¹⁹⁵ The majority also argued that the deadline "reflects Congress' strong preference for the prompt resolution of

187. *Id.* at 621.

188. *Id.* at 643 (Ginsburg, J., dissenting).

189. *Id.*

190. *Id.* at 621–22 (majority opinion).

191. *Id.* at 645 (Ginsburg, J., dissenting).

192. This is the Court's only description:

Petitioner Lilly Ledbetter (Ledbetter) worked for respondent Goodyear Tire and Rubber Company (Goodyear) at its Gadsden, Alabama, plant from 1979 until 1998. During much of this time, salaried employees at the plant were given or denied raises based on their supervisors' evaluation of their performance. In March 1998, Ledbetter submitted a questionnaire to the EEOC alleging certain acts of sex discrimination, and in July of that year she filed a formal EEOC charge.

Id. at 621. (majority opinion).

193. *Id.* at 628 ("The EEOC charging period is triggered when a discrete unlawful practice takes place.").

194. *Id.* at 629–32.

195. *Id.* at 630.

employment discrimination allegations through voluntary conciliation and cooperation.¹⁹⁶ The Court spent a more significant amount of time, however, analyzing the problem of reconstructing intent many years after the fact. As the Court stated:

For example, in a case such as this in which the plaintiff's claim concerns the denial of raises, the employer's challenged acts (the decisions not to increase the employee's pay at the times in question) will almost always be documented and will typically not even be in dispute. By contrast, the employer's intent is almost always disputed, and evidence relating to intent may fade quickly with time. In most disparate-treatment cases, much if not all of the evidence of intent is circumstantial. Thus, the critical issue in a case involving a long-past performance evaluation will often be whether the evaluation was so far off the mark that a sufficient inference of discriminatory intent can be drawn. This can be a subtle determination, and the passage of time may seriously diminish the ability of the parties and the factfinder to reconstruct what actually happened.¹⁹⁷

This concern would resonate with HR personnel. Following the *Faragher* and *Ellerth* roadmap, HR departments take the lead on internal investigations. But if the department does not know about a problem, such as differentials in pay based on sex, they cannot investigate it. If unfair pay claims could be brought years after salaries were set, HR departments would be left to reconstruct the factors that went into the decisions well after the fact. It is much harder to demonstrate the good faith of a salary discrepancy years later, when evidence that would have been available contemporaneously with the decision no longer exists.¹⁹⁸

Compensation procedures are particularly thorny. Because of the range of possibilities when it comes to compensation, both in amount and type, the HR literature has spent extensive amounts of time on establishing best practices in the area.¹⁹⁹ Of course, the problem of pay disparity is a

196. *Id.* at 630–31.

197. *Id.* at 631–32 (citations omitted).

198. SHRM and the Equal Employment Advisory Council make this point in their brief, arguing that finding for *Ledbetter* would essentially eliminate the statute of limitation and would impose an “undue burden” on the employer to defend against stale claims. Brief Amici Curiae of the Equal Employment Advisory Council and the Society for Human Resource Management in Support of Respondent at 5–6, *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007) (No. 5-1074) [hereinafter SHRM *Ledbetter* Amicus Brief].

199. See, e.g., Barry Gerhart et al., *Employee Compensation: Theory, Practice, and Evidence*, in HANDBOOK OF HUMAN RESOURCE MANAGEMENT 528 (Gerald R. Ferris et al. eds. 1995); Stephen E. Condrey et al., *Compensation: Choosing and Using the Best System for Your Organization*, in HUMAN RESOURCES MANAGEMENT: CONTEMPORARY ISSUES, CHALLENGES, AND OPPORTUNITIES 421 (Ronald R. Sims ed. 2007).

continuing and insidious problem. The Court's decision reflected an overly technocratic and HR-oriented response to a difficult problem. But it becomes more understandable when viewed through the eyes of those who manage compensation policies—especially if, as intimated by cases like *Dukes*, we do not assume HR's bad faith.

Not all of the Roberts Court's discrimination cases expressly reflect a HR perspective. Some instead are better described as displaying what others have characterized as an anti-litigation or anti-plaintiff orientation, in that they make it easier to dismiss cases earlier in the process.²⁰⁰ For example, in *Gross v. FBL Financial Services, Inc.*,²⁰¹ the Court held that ADEA discrimination claims required proof of "but-for" causation, thus disallowing a mixed-motives instruction to the jury.²⁰² It returned to the same interpretive analysis as to Title VII's retaliation protections in *University of Texas Southwestern Medical Center v. Nassar*.²⁰³ These opinions are largely about managing the course of litigation. The recent case of *Vance v. Ball State University*²⁰⁴ adopted a narrower definition of the term "supervisor" as to the Title VII affirmative defense for hostile work environment claims. Narrower, easier-to-apply definitions do help HR departments, as SHRM argued in its amicus brief supporting the employer in *Vance*.²⁰⁵ But this case essentially narrows the scope of an employer's liability without having much of an effect on HR practices.²⁰⁶

200. See, e.g., Arthur Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 366–67 (2013) ("Nor do I think it unfair to say that some Justices on the current Court and some members of the federal judiciary are disenchanted with civil litigation and wish to limit it, which, of course, negatively impacts access and works against those in our lower and middle economic classes who want entre to the civil justice system."); *id.* at 371 (characterizing the Roberts Court as "a Supreme Court that appears preoccupied with early termination and magnifying ways of avoiding adjudication on the merits or diverting disputes to arbitration"); Liptak, *supra* note 20 (arguing that the Court was "not particularly welcoming to efforts by plaintiffs' attorneys to open up new avenues of litigation" (quoting Jonathan Adler)).

201. 557 U.S. 167 (2009).

202. *Id.* at 169–70.

203. 133 S. Ct. 2517 (2013).

204. 133 S. Ct. 2434 (2013).

205. Brief of the Society for Human Resource Management and the College and University Professional Association for Human Resources as Amici Curiae in Support of Respondent at 11, *Vance v. Ball State Univ.*, 133 S. Ct. 2434 (2013) (No. 11-556) ("It should . . . be insufficient to put the employer at risk for conduct that, without an internal complaint by the alleged victim, would not come to the attention of human resources professionals for investigation and appropriate remedial action.").

206. See, e.g., *Vance*, 133 S. Ct. at 2450 ("Under the definition of 'supervisor' that we adopt today, the question of supervisor status, when contested, can very often be resolved as a matter of law before trial. . . . And even where the issue of supervisor status cannot be eliminated from the trial (because there are genuine factual disputes about an alleged harasser's authority to take tangible employment actions), this preliminary question is relatively straightforward.").

B. Retaliation

Those looking to characterize the Roberts Court's approach to employment law as purely "conservative" or "pro-business" must contend with the Court's cases in the area of retaliation, many of which undermine the view.²⁰⁷ The Court's decision in *Burlington Northern and Santa Fe Railway Co. v. White*,²⁰⁸ one of its first decisions under the new chief justice, considered the scope of Title VII protections afforded against retaliation. The opinion rejected lower courts' narrower interpretations and instead concluded that the antiretaliation provisions of the statute are not confined to those that are related to employment or that occur at the workplace.²⁰⁹ The Court also held that an employer's actions could be considered retaliation if "they could well dissuade a reasonable worker from making or supporting a charge of discrimination."²¹⁰ Although Justice Alito concurred in judgment, proposing a narrower standard,²¹¹ the other eight Justices agreed to the expansive interpretation. The retaliation alleged in the case could have been viewed as *de minimis*, as the plaintiff was reassigned without loss in pay or benefits, and the employer retracted her 37-day suspension after the fact, giving her backpay.²¹² Nevertheless, the Court unanimously affirmed the jury's award of \$43,500.²¹³

The Roberts Court went on to expand the statutory definition of retaliation in *Thompson v. North American Stainless, LP*.²¹⁴ *Thompson* concerned an employer's alleged decision to fire the fiancé of an employee in retaliation for the employee's decision to file a sex discrimination claim with the EEOC.²¹⁵ The Court had "little trouble" concluding that the alleged facts constituted a violation of Title VII's antiretaliation provisions.²¹⁶ Relying on the *Burlington* standard, the Court said: "[w]e think it obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired."²¹⁷ The Court was not troubled by the ambiguity as to the type of relationships

207. See Liptak, *supra* note 20 ("Employees suing over retaliation for raising discrimination claims have fared quite well . . .").

208. 548 U.S. 53 (2006).

209. *Id.* at 57.

210. *Id.*

211. *Id.* at 75 (Alito, J., concurring in the judgment).

212. *Id.* at 58 (majority opinion).

213. *Id.* at 70–73.

214. 131 S. Ct. 863 (2011).

215. *Id.* at 867.

216. *Id.*

217. *Id.* at 868.

covered.²¹⁸ Flexibility, according to the Court, was necessary to accommodate “the broad statutory text and the variety of workplace contexts in which retaliation may occur.”²¹⁹ Even though the fired employee was not the target of the retaliatory motive, the Court found he still had standing to sue because he fell within the “zone of interests” protected by the statute.²²⁰ Because hurting the plaintiff was the employer’s chosen and unlawful means for retaliating against his fiancée, he was “well within the zone of interests sought to be protected by Title VII.”²²¹

At first glance, the results of these cases may not seem particularly friendly to HR departments. In fact, SHRM (in conjunction with the National Federation of Independent Businesses) filed an amicus brief in support of the employer in *Burlington*.²²² The brief argued that retaliation should be limited to tangible employment actions, such as termination or a failure to promote, because otherwise the employer’s hands would be tied in its day-to-day employee management.²²³ According to the amici, allowing retaliation claims on these lower-order offenses would provide a “temptation” for employees and their attorneys to opt out of the internal grievance system and file suit.²²⁴

However, these decisions do not undercut the interests of HR in actuality. First, in both cases, the employee stepped outside of the employer’s internal HR process and filed an antidiscrimination claim that led to the alleged retaliation. Thus, the claim that employers needed to be free of government interference was belied to an extent by the preexisting claim, which already brought the government into the picture. Second, the recognition of claims based on smaller-bore offenses actually helps well-intentioned HR departments do their jobs in correcting improper conduct. HR must stand as a bulwark against the decisions by other firm participants that violate the law or public policy. The amici recognized this in their brief:

[R]etaliation claims often concern conduct arising from an emotional response that simply reflects human nature: a supervisor

218. *Id.* (“We expect that firing a close family member will almost always meet the *Burlington* standard, and inflicting a milder reprisal on a mere acquaintance will almost never do so, but beyond that we are reluctant to generalize.”).

219. *Id.*

220. *Id.* at 870.

221. *Id.*

222. Brief of the Society for Human Resource Management and the National Federation of Independent Business Legal Foundation as Amici Curiae in Support of the Petitioner, *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006) (No. 05-259) [hereinafter SHRM *Burlington* Amicus Brief].

223. *Id.* at 4, 16–21.

224. *Id.* at 14.

wrongfully accused of discrimination may, without intending impermissible retaliation, get caught up in the heat of the moment. The employer's internal mechanisms, implemented through a human resource professional or upper level management, who act as goalkeepers, fulfill the employer's responsibility to ensure that human nature is not permitted to eviscerate statutory rights. Missteps of human nature should be permitted to be investigated and potentially cured by internal review.²²⁵

What the brief misses, however, is that other members of the firm are more likely to go along with HR's internal review if they fear that the firm will suffer government sanctions otherwise. HR departments would be rendered relatively toothless in fighting against retaliation if employers could carry out their attacks below the radar without fear of being called to account. And if lower-level retaliation goes unchecked, then future potential claimants will be chilled in their decisions about filing a claim—at least if they hope to stay with the company. Thus, poor antiretaliation enforcement could cause the entire edifice of internal dispute resolution to come crumbling down. As the Court recognized in *Burlington*, “[a]n employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace. A provision limited to employment-related actions would not deter the many forms that effective retaliation can take.”²²⁶

The ramifications of strong antiretaliation protections within a HR-oriented framework became clear in *Crawford v. Metropolitan Government of Nashville and Davidson County Tennessee*.²²⁷ In *Crawford*, the employer had received complaints about inappropriate sexual behavior by the newly-hired employee relations director for the school district.²²⁸ The matter was routed through the HR department, and the assistant HR director contacted employees in the director's department pursuant to her investigation.²²⁹ One of those employees, Vicky Crawford, reported to the assistant HR director that the employee relations director sexually harassed her and her fellow employees.²³⁰ To this point, however, Crawford brought no formal complaint either internally, with the EEOC, or with a state fair employment practices agency. After the investigation, the employer concluded that

225. *Id.* at 17 (citation omitted).

226. *Burlington*, 548 U.S. at 63–64 (citations omitted; emphasis in original).

227. 555 U.S. 271 (2009).

228. The discussion of facts was taken from *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, 211 F. App'x 373, 374–375 (6th Cir. 2006), which has a more extensive narrative of the events in question.

229. *Id.* The employee relations director would normally have been responsible for investigating such complaints. *Id.* at 374.

230. *Id.* at 375.

Hughes engaged in inappropriate behavior but did not take any disciplinary action against him. All three employees who testified in the HR investigation, however, were terminated.²³¹ Crawford was fired for alleged embezzlement and drug use – charges she claimed were later proven to be untrue.²³² She then brought suit under Title VII’s antiretaliation provisions.

The lower courts dismissed Crawford’s claim, finding that it did not meet the requirements for Title VII’s protection under either the “participation” clause or the “opposition” clause.²³³ Section 704 of the 1964 Civil Rights Act prohibits employers from discriminating against an individual “because he has opposed any practice made an unlawful employment practice by this subchapter,” known as the opposition clause, or “because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter,” known as the participation clause.²³⁴ On review, the Supreme Court did not reach the participation-clause issue, but it held in favor of Crawford under the opposition clause.²³⁵ Finding that “Crawford’s description of the louche goings-on would certainly qualify in the minds of reasonable jurors as resistant or antagonistic to [the employee relations director]’s treatment,”²³⁶ the Court held that opposition clause protection “extends to an employee who speaks out about discrimination not on her own initiative, but in answering questions during an employer’s internal investigation.”²³⁷

The employer in *Crawford* argued that lowering the bar for retaliation claims would discourage employers from investigating claims in the first place.²³⁸ The Court expressed skepticism on this point, as it noted “the incentive to enquire that follows from our decisions in *Burlington Industries, Inc. v. Ellerth* and *Faragher v. Boca Raton*.”²³⁹ Discussing the

231. *Id.*

232. *Id.* On remand from the Supreme Court’s decision, the district court denied the employer’s motion for summary judgment. *Crawford v. Metro. Gov’t of Nashville and Davidson Cnty., Tenn.*, No. 3:03–0996, 2009 WL 3348233 (M.D. Tenn. Oct. 15, 2009). The case went to trial, and Crawford was awarded \$1.56 million in damages. E. Thomas Wood, *Crawford Lawsuit Costs Metro Another \$333,000*, NASHVILLE POST, April 13, 2010, http://www.nashvillepost.com/news/2010/4/13/crawford_lawsuit_costs_metro_another_333000. The employee relations director resigned in 2003 after acknowledging that he had falsely claimed to be a lawyer, a Navy SEAL, and a professional football player. *Id.*

233. *Crawford*, 555 U.S. at 275.

234. 42 U.S.C. § 2000e-3 (2012).

235. The participation clause might seem to be a natural fit since Crawford was participating in an investigation of sexual harassment. But the statutory text poses problems, as it limits coverage to filing a charge or to “participat[ing] . . . in an investigation, proceeding, or hearing *under this subchapter*.” *Id.* (emphasis added). The employer’s investigation in *Crawford* was not a governmental investigation conducted pursuant to Title VII authority and guidelines.

236. *Crawford*, 555 U.S. at 276 (citations and quotations omitted).

237. *Id.* at 273.

238. *Id.* at 278–79.

239. *Id.* at 278 (citations omitted).

requirements of the affirmative defense, the Court stated that “[e]mployers are thus subject to a strong inducement to ferret out and put a stop to any discriminatory activity in their operations as a way to break the circuit of imputed liability.”²⁴⁰ Indeed, the Court pooh-poohed the employer’s fears, stating: “[t]he possibility that an employer might someday want to fire someone who might charge discrimination traceable to an internal investigation does not strike us as likely to diminish the attraction of an *Ellerth-Faragher* affirmative defense.”²⁴¹

More importantly, however, the Court found it likely that a contrary holding would considerably weaken the affirmative defense, as it would undercut the mutual incentives that provide for its operation. As the Court described:

If it were clear law that an employee who reported discrimination in answering an employer’s questions could be penalized with no remedy, prudent employees would have a good reason to keep quiet about Title VII offenses against themselves or against others. This is no imaginary horrible given the documented indications that “[f]ear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination.” Brake, *Retaliation*, 90 Minn. L. Rev. 18, 20 (2005); see also *id.*, at 37, and n. 58 (compiling studies). The appeals court’s rule would thus create a real dilemma for any knowledgeable employee in a hostile work environment if the boss took steps to assure a defense under our cases. If the employee reported discrimination in response to the enquiries, the employer might well be free to penalize her for speaking up. But if she kept quiet about the discrimination and later filed a Title VII claim, the employer might well escape liability, arguing that it “exercised reasonable care to prevent and correct [any discrimination] promptly” but “the plaintiff employee unreasonably failed to take advantage of . . . preventive or corrective opportunities provided by the employer.” *Ellerth, supra*, at 765, 118 S. Ct. 2257. Nothing in the statute’s text or our precedent supports this catch-22.²⁴²

Ultimately, the *Crawford* Court—unanimous in result, with only Justices Alito and Scalia concurring in judgment—was moved by concerns about its *Faragher-Ellerth* affirmative defense. A strict textual reading of the statute is more equivocal than the Court allows, as an employee testifying about her boss’s behavior is not necessarily “opposing” it. In *Crawford*, the plaintiff told her story at the request of an HR official as part

240. *Id.*

241. *Id.* at 279.

242. *Id.*

of an official investigation.²⁴³ Her report about the director's behavior was arguably part of her work duties; it was not an individual effort on her part to vindicate the wrongs that she and others had suffered. The Court dismissed the possibility that testimony about discrimination or harassment could be supportive of such behavior as "eccentric cases."²⁴⁴ But it did not consider the possibility that such testimony could be neither supportive nor opposed, but neutral. That the employee had not complained about such behavior, either to the employer or the government, is further evidence of neutrality. It is something of stretch to say that invited testimony about a coworker's behavior in the context of an employer's investigation means that the employee "has opposed [a] practice made an unlawful employment practice" under Title VII.²⁴⁵

The weakness of the textual argument heightens the importance of the Court's policy arguments. And those policy arguments rest on the protection of the *Faragher-Ellerth* defense. As the Court noted in its opinion, "*Ellerth* and *Faragher* have prompted many employers to adopt or strengthen procedures for investigating, preventing, and correcting discriminatory conduct."²⁴⁶ If internal investigations were not protected, then "knowledgeable" employees—including those already represented by counsel—would logically (and reasonably) refuse to participate in such investigations. In order to protect HR departments in conducting their jobs with propriety and dispatch, the Court protected individuals who work with HR departments. Crawford—who had not complained nor filed a charge, yet provided unblinking testimony to HR personnel when called upon to do so—was in this respect an ideal employee. The Roberts Court insured that she and those like her would not be left out of the new antidiscrimination regulatory structure.

The Court was on similarly thin textual ice two years later in its decision in *Kasten v. Saint-Gobain Performance Plastics Corp.*²⁴⁷ The Court was called upon to interpret the antiretaliation provision of the Fair Labor Standards Act (FLSA), which prohibits discrimination against an employee "because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter"²⁴⁸ The plaintiff in *Kasten* orally complained to company personnel about the improper placement of time clocks within the

243. *Id.* at 273–74.

244. *Id.* at 276–77.

245. *Id.* at 276. Moreover, the Court did not determine whether the director's conduct was actually a violation of Title VII.

246. *Id.* at 278–79.

247. 131 S. Ct. 1325 (2011).

248. 29 U.S.C. § 215(a)(3) (2012).

employer's facility.²⁴⁹ A court later ruled that the placement did in fact violate the FLSA.²⁵⁰ The plaintiff claimed he was fired for his oral complaints within the company, but the Seventh Circuit found that the FLSA's antiretaliation provisions did not cover oral complaints.²⁵¹ In a 6-2 decision, the Supreme Court disagreed.²⁵²

The *Kasten* majority began its analysis with a traditional examination of the text. Although the Seventh Circuit, as well as the Supreme Court dissent, found that "filed" indicated the need for a writing, the majority held that "filed" was sometimes used in the context of oral statements or submissions.²⁵³ The Court also noted the breadth of the language "any complaint" and argued that it counseled for a more expansive interpretation.²⁵⁴ Finding the text itself to be inconclusive, the majority turned to a functional analysis to find an answer. The Court found it was not Congressional purpose to "limit the enforcement scheme's effectiveness by inhibiting use of the Act's complaint procedure by those who would find it difficult to reduce their complaints to writing, particularly illiterate, less educated, or overworked workers."²⁵⁵ Moreover, such a limitation would "discourage the use of desirable informal workplace grievance procedures to secure compliance with the Act."²⁵⁶ The Court did not actually rule on whether an internal company complaint, rather than a complaint filed with a government agency or court, would suffice to meet the statutory requirements. It instead left the question open, having found that the employer failed to preserve the issue.²⁵⁷ Although the text of the FLSA's antiretaliation provision is different than Title VII's, it seems likely that the Court will ultimately follow *Crawford*'s lead and allow internal complaints.

The *Kasten* decision itself follows *Crawford*'s lead in shoring up the internal grievance framework despite a shaky textual foundation. The plaintiff in *Kasten* complained to his supervisor as well as the HR department; as the Court characterizes it, *Kasten* "called the unlawful timeclock location to Saint-Gobain's attention—in accordance with Saint-Gobain's internal grievance-resolution procedure."²⁵⁸ He worked his way up the chain of command: beginning with his shift supervisor, then moving

249. *Kasten*, 131 S. Ct. at 1329–30.

250. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 556 F. Supp. 2d 941, 954 (W.D. Wis. 2008).

251. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 570 F.3d 834, 838–40 (7th Cir. 2009).

252. *Kasten*, 131 S. Ct. at 1328–29.

253. *Id.* at 1331.

254. *Id.* at 1332.

255. *Id.* at 1333.

256. *Id.* at 1334.

257. *Id.* at 1336.

258. *Id.* at 1329.

on to an HR employee, then to his lead operator, and finally to the HR manager and operations manager.²⁵⁹ This internal effort to correct an illegal practice is exactly the kind of HR orientation towards employment law that the Court is looking to facilitate and encourage. If, as the plaintiff alleged, he was then fired for his complaint, the *Faragher-Ellerth* mechanisms would be compromised. The Court recognized as such, citing to *Ellerth* in discussing the need for antiretaliation protections for internal complaints.²⁶⁰ If the FLSA only protected formal written complaints, future plaintiff's attorneys would encourage (require?) their clients to file written charges in order to protect themselves against retaliation. Such formality would only gum up HR processes. Once again, the Roberts Court recognized that a well-functioning internal complaint system needs protections against retaliation in order to function. And despite questionable textual mooring, the *Kasten* decision bolsters those protections.

C. Privacy

The Supreme Court has only limited jurisdiction over workplace privacy concerns. The primary employee privacy protections are found within state law.²⁶¹ However, public sector employees have federal constitutional privacy protections.²⁶² The Rehnquist Court endeavored to establish the standard for these protections in *O'Connor v. Ortega*.²⁶³ In that case, a state hospital conducted a search of the office and files of an employee who was accused of workplace wrongdoing.²⁶⁴ The employee sued the state, claiming a violation of his Fourth Amendment right against unreasonable searches.²⁶⁵ In a vote split between a four-member plurality

259. *Id.* at 1330.

260. *See id.* at 1334 (“And insofar as the antiretaliation provision covers complaints made to employers (a matter we need not decide, see *infra*, at 14–15), it would discourage the use of desirable informal workplace grievance procedures to secure compliance with the Act. Cf. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 764 (1998) (reading Title VII to encourage the development of effective grievance procedures to deter misconduct); D. McPherson, C. Gates, & K. Rogers, *Resolving Grievances: A Practical Approach* 38–40 (1983) (describing the significant benefits of unwritten complaints).”).

261. *See* Paul M. Secunda, *Privatizing Workplace Privacy*, 88 NOTRE DAME L. REV. 277, 279 (2012) (“Without federal constitutional protections, private sector employees must instead rely on either the common law of torts . . . or on various other federal and state legislative enactments, for their workplace privacy rights.”).

262. The Fourth Amendment protects individuals “against unreasonable searches and seizures.” U.S. CONST. amend. IV. This protection applies to employees when the government acts in its capacity as employer. *See Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 665 (1989) (“[T]he Fourth Amendment protects individuals from unreasonable searches conducted by the Government, even when the Government acts as an employer False”).

263. 480 U.S. 709 (1987).

264. *Id.* at 712–14 (O’Connor, J.) (plurality opinion). The employee was the chief of professional education for psychiatry residents at the hospital. *Id.* at 712.

265. *Id.* at 714.

and one-member concurrence in the judgment, the Rehnquist Court rejected the government's claim that the Fourth Amendment did not apply, but it also held that neither a warrant nor probable cause were necessary for routine, work-related searches.²⁶⁶ In order to make a claim for a workplace privacy violation, the *Ortega* plurality required that the employee first have a reasonable expectation of privacy as to the location,²⁶⁷ and then that the employee's expectations were violated by a search that failed the standard of reasonableness as to its inception or its scope.²⁶⁸ Implying a fairly nonrestrictive standard, the plurality noted: "[o]rdinarily, a search of an employee's office by a supervisor will be 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct, or that the search is necessary for a noninvestigatory work-related purpose such as to retrieve a needed file."²⁶⁹ In his concurrence, Justice Scalia argued that employees always had an expectation of privacy in their workplaces and personal effects therein.²⁷⁰ He advocated for the adoption of a simple reasonableness test, and noted that common workplace government searches would meet the test.²⁷¹

Although the plurality and concurrence disagreed as to the mechanics of the standard, both appeared to agree on basic principles. The ultimate question is whether a search is reasonable within its parameters. And the government acting as an employer is subject to different standards of reasonableness than the government acting in its law enforcement capacity.²⁷² There is no need for a warrant or probable cause, even if the search is designed to locate evidence of suspected work-related employee

266. *Id.* at 717, 722–23; *id.* at 731–32 (Scalia, J., concurring in the judgment). Specifically, the four-member plurality limited itself to the Fourth Amendment standard for “a noninvestigatory work-related intrusion or an investigatory search for evidence of suspected work-related employee misfeasance.” *Id.* at 723 (plurality opinion).

267. *Id.* at 717–18 (plurality opinion).

268. *Id.* at 725–26.

269. *Id.* at 726.

270. *Id.* at 731 (Scalia, J., concurring in the judgment) (“I would hold, therefore, that the offices of government employees, and *a fortiori* the drawers and files within those offices, are covered by Fourth Amendment protections as a general matter.”).

271. *Id.* at 731–32 (Scalia, J., concurring in the judgment) (“The government, like any other employer, needs frequent and convenient access to its desks, offices, and file cabinets for work-related purposes. I would hold that government searches to retrieve work-related materials or to investigate violations of workplace rules—searches of the sort that are regarded as reasonable and normal in the private-employer context—do not violate the Fourth Amendment.”).

272. *Id.* at 717 (plurality opinion) (“The operational realities of the workplace, however, may make *some* employees' expectations of privacy unreasonable when an intrusion is by a supervisor rather than a law enforcement official.” (emphasis in original)); *id.* at 732 (Scalia, J., concurring in the judgment) (concluding that “the government's status as employer, and the employment-related character of the search, become relevant” when considering the reasonableness of the search); see also *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 598 (2008) (making this point).

misfeasance.²⁷³ To hold otherwise would impede the discretion that public employers need in conducting their business.²⁷⁴ This determination is not without critics, starting with the four dissenters in the case.²⁷⁵ But it shows that the Rehnquist Court focused more on the milieu of the everyday workplace, rather than on the government's overarching search and seizure powers.

The Roberts Court has continued using *Ortega's* flexible, employer-oriented approach to employee privacy. The question in *City of Ontario v. Quon*,²⁷⁶ as in *Ortega*, was whether the public employer violated its employee's Fourth Amendment right against unreasonable searches. However, *Quon* involved a "location" with more uncertain privacy protections: an employer's text messaging system. The system in question was run by the City of Ontario's police department to allow its officers to communicate with one another.²⁷⁷ The department provided the officers with pagers, and the messages were transmitted over a private company's wireless service pursuant to a contract between the company and the city.²⁷⁸ The City's privacy policy reserved to the City the right to monitor the system, but a supervisor within the department also indicated that the texts would not be reviewed if employees paid for any additional expenses incurred by going over a certain character limit.²⁷⁹ After a set of employees consistently went over the character limits for several months, the chief of police decided to conduct an audit to determine whether the limits were too low for work-related purposes. The audit determined that in fact the employees were using the messaging system primarily for personal purposes, and that some of the texts were sexually explicit. As a result of the audit, the plaintiff-employee was allegedly disciplined.²⁸⁰

Quon presented the Roberts Court with a number of complicated inquiries, such as whether to use the *Ortega* plurality's two-step approach, Justice Scalia's reasonableness approach, or another newly created scheme. Moreover, what sort of privacy expectations do employees have in this new electronic environment? Although the *Quon* majority did address these concerns,²⁸¹ it largely avoided answering them. Instead, it skipped all the

273. 480 U.S. at 723–25 (plurality opinion).

274. *Id.*; *id.* at 732 (Scalia, J., concurring in the judgment).

275. *Id.* at 741–42 (Blackmun, J., dissenting) (arguing that there is no special need to dispense with the warrant and probable cause requirements of reasonableness).

276. 130 S. Ct. 2619 (2010).

277. *Id.* at 2625 ("The City issued pagers to [plaintiff] and other SWAT Team members in order to help the SWAT Team mobilize and respond to emergency situations.").

278. *Id.*

279. *Id.* The written privacy policy applied to the City's email system but was applied to the text messaging system orally at a staff meeting. *Id.*

280. *Id.* at 2626.

281. *Id.* at 2629–30.

way to the end to determine that the search was reasonable and therefore constitutional. In getting to this end point, the Court decided not to choose the proper doctrinal standard to use²⁸² or to determine whether the police officers had a reasonable expectation of privacy.²⁸³ Such diversions were not necessary, according to the Court, because ultimately the search itself was justified in its inception and reasonable in its scope. The Court found that the Department had a reasonable basis for examining the text messages—namely, its desire to know whether the text messaging character limit was sufficient for the officers’ needs—and found the two-month scope of the search to be reasonable as well.²⁸⁴ Because the department acted reasonably in conducting the search, said the Court, the search was constitutional.

In jumping ahead to the final doctrinal hurdle to resolve the case, the Court arguably chose the weakest link upon which to rest its opinion. The Department told the officers that they must reimburse the department for any text-messaging overages and, if they did so, there would be no need to audit the messages themselves.²⁸⁵ The department leadership later changed its mind, because they had become “tired of being bill collectors” and because they were worried that the existing character limits were too low.²⁸⁶ Neither of these is a good reason to conduct a search of the contents of the messages without notifying the officers ahead of time. Had the Department been worried about malfeasance or even misfeasance of some kind, the search might have made more sense. But the two justifications provided seem fairly weak, especially when the Department could have simply changed its policy going forward.²⁸⁷ There was no need for exigency. Despite the existence of less intrusive means of searching, with seemingly no loss in effectiveness, the Court still found the search to be reasonable. The Court noted that the government need not use the least intrusive methods possible in order for the search to be reasonable.²⁸⁸ Instead, the Court gave the department wide berth in determining how to conduct its review of the text-messaging system. The Court held: “a reasonable employee would be aware that sound management principles might require the audit of messages to determine whether the pager was being

282. *Id.* at 2628–29 (“It is not necessary to resolve [which test is correct.] The two *O’Connor* [*v. Ortega*] approaches—the plurality’s and Justice Scalia’s—therefore lead to the same result here.”).

283. *Id.* at 2630 (assuming *arguendo* that Quon had a reasonable expectation of privacy).

284. *Id.* at 2631.

285. *Id.* at 2625.

286. *Id.* at 2626.

287. This approach was suggested by the Court of Appeals below. *Quon v. Arch Wireless Operating Co.*, 529 F.3d 892, 909 (9th Cir. 2008) (finding that there were “a host of simple ways to verify the efficacy of the 25,000 character limit . . . without intruding on Appellants’ Fourth Amendment rights.”).

288. *Quon*, 130 S. Ct at 2632.

appropriately used.”²⁸⁹ Notice what the Court is saying: employees should be reasonable enough to think in terms of “sound management principles.”

Paul Secunda has argued that the *Quon* opinion continues the trend toward the “privatization” of public employee privacy.²⁹⁰ In his view, the Court has looked to the private sector in determining the proper levels of privacy protections afforded to public employees.²⁹¹ Such an approach would be in line with a Court that took an HR perspective. Employee privacy is a critical workplace issue, and much remains uncertain about the extent to which employees can fence out employer intrusions within the workplace. Put into the role of public-sector HR manager, thanks to the constitutionalization of public-employee privacy, the Roberts Court opts for a doctrine that looks to follow reasonable HR practices. One can understand why an HR-oriented Court would object to warrant or probable cause requirements, as suggested by commentators like Secunda for certain circumstances.²⁹² Such requirements would dramatically depart from the *modus operandi* of the modern workplace.

The Court’s reliance on a private HR-oriented approach to public-employee privacy is even more apparent in *National Aeronautics and Space Administration v. Nelson*.²⁹³ In that case, contract employees at NASA’s Jet Propulsion Laboratory were required to go through background checks due to a change in regulatory procedure.²⁹⁴ These employees were given a questionnaire to complete, and additional questionnaires were sent to the employees’ references and past landlords.²⁹⁵ Employees subject to this background check process brought suit, arguing that the process infringed upon their rights to informational privacy.²⁹⁶ The Ninth Circuit agreed, highlighting two aspects of the investigations that were problematic.²⁹⁷ First, the employee questionnaire asked, as a follow-up to an initial question about drug use, whether the employee had had any treatment or counseling for drug use in the last year.²⁹⁸ Second, another questionnaire, sent to references, asked a series of open-ended questions pertaining to the

289. *Id.* at 2631.

290. *See* Secunda, *supra* note 261, at 281.

291. *Id.* (“But rather than elevating private-sector privacy rights to the public-sector level, *Quon* suggests that public employee workplace privacy rights should be ‘privatized’ and reduced to the level of employees in the private sector.”).

292. *Id.* at 312–15 (arguing for such requirements for investigatory searches).

293. 131 S. Ct. 746 (2011).

294. *Id.* at 752. The change was accomplished through a presidential directive. *See* Homeland Security Presidential Directive/HSPD -12—Policy for a Common Identification Standard for Federal Employees and Contractors, Public Papers of the President, George W. Bush, Vol. 2, Aug. 27, 2007, at 1765, App. 127.

295. *Nelson*, 131 S. Ct. at 752–53.

296. *Id.* at 754.

297. *Nelson v. Nat’l Aeronautics & Space Admin.*, 530 F.3d 865, 878–81 (9th Cir. 2008).

298. *Nelson*, 131 S. Ct. at 759.

employees' honesty, financial integrity, drug use, and overall "suitability" for government employment.²⁹⁹ The circuit court enjoined these aspects of the investigation.³⁰⁰

As in *Quon*, the Supreme Court had serious doctrinal issues to tackle in resolving *Nelson*. The most important question was whether a right to information privacy even existed. The Court had alluded to an interest in "avoiding disclosure of personal matters" in *Whalen v. Roe*³⁰¹ and *Nixon v. Administrator of General Services*,³⁰² but had never established whether a constitutional right existed. As in *Quon*, however, the *Nelson* Court once again skipped through the preliminaries to find that the questionnaires were in fact reasonable. The Court assumed, without deciding, that the constitutional right to information privacy existed.³⁰³ Instead of focusing on this issue, the Court examined whether the government's questions would violate such a right, and it concluded that they would not.³⁰⁴ In its review, the Court compared the questions to employment practices used in businesses across the country.³⁰⁵ The Court remarked that these questions were "part of a standard employment background check of the sort used by millions of private employers."³⁰⁶ Discussing the drug-related inquiries, the Court contended that "[l]ike any employer, the Government is entitled to have its projects staffed by reliable, law-abiding persons who will efficiently and effectively discharge their duties."³⁰⁷ Even if the phrasing of the question was potentially more intrusive than necessary, the Court rejected any constitutional requirement to choose the least restrictive means.³⁰⁸ As for the open-ended questions for the employee's references, the Court looked to both public and private HR practices in determining their reasonableness:

The reasonableness of such open-ended questions is illustrated by their pervasiveness in the public and private sectors. Form 42 alone is sent out by the Government over 1.8 million times annually. *Ibid.* In addition, the use of open-ended questions in employment background checks appears to be equally commonplace in the private sector. See, e.g., S. Bock et al., *Mandated Benefits 2008*

299. *Id.* at 761.

300. *Nelson*, 530 F.3d at 878–81.

301. 429 U.S. 589, 599–600 (1977).

302. 433 U.S. 425, 457 (1977).

303. *Nelson*, 131 S. Ct. at 751.

304. The judgment was unanimous; Justices Scalia and Thomas filed opinions concurring in the judgment in which they found no constitutional right to information privacy. See *id.* at 764 (Scalia, J., concurring in the judgment); *id.* at 769 (Thomas, J., concurring in the judgment).

305. *Nelson*, 131 S. Ct. at 758 (majority opinion) (arguing that "the Government could not function" if every employment decision became a constitutional matter).

306. *Id.*

307. *Id.* at 759–60 (citations and quotations omitted).

308. *Id.* at 760.

Compliance Guide, Exh. 20.1, A Sample Policy on Reference Checks on Job Applicants (“Following are the guidelines for conducting a telephone reference check: . . . Ask open-ended questions, then wait for the respondent to answer”); M. Zweig, *Human Resources Management* 87 (1991) (“Also ask, ‘Is there anything else I need to know about [candidate’s name]?’ This kind of open-ended question may turn up all kinds of information you wouldn’t have gotten any other way”). The use of similar open-ended questions by the Government is reasonable and furthers its interests in managing its operations.³⁰⁹

In both *Quon* and *Nelson*, the Supreme Court confronted weighty constitutional questions about the scope of the Fourth Amendment’s protections and the existence of a right to information privacy. But it moved past both these questions on to more comfortable terrain—namely, whether the HR policies and practices in question had been reasonable. Looking to private businesses for comparison, the Court found that the public employers had acted properly. These cases provide another set of examples as to how the Court addresses employment issues most comfortably from the HR perspective.

D. ERISA

ERISA and HR go hand-in-hand. HR departments generally have the responsibility of managing the pension and welfare benefits governed by ERISA’s protections.³¹⁰ The complexity of ERISA’s pension and welfare benefits regulations helped to stimulate the growth of HR departments as professional training aids in the understanding of the financial, accounting, and legal requirements necessary to provide these benefits.³¹¹ The tax ramifications are sufficiently beneficial to induce the creation of health care, retirement, and other benefit plans.³¹² But, as the Court is keen to remind us in its opinions, nothing in ERISA requires employers to have these plans in the first place.³¹³

309. *Id.* at 761.

310. See Jacoby, *supra* note 13, at 165 (describing “provider of services to career employees, including benefits, training, and development” as a traditional HR role); Kaufman, *supra* note 47, at 107 (“Compliance with these laws [including ERISA] is the responsibility of the HR department in most companies—a job that has assumed strategic importance with the growth of litigiousness in American society”); *Benefits*, SOCIETY FOR HUMAN RESOURCE MANAGEMENT, <http://www.shrm.org/HRdisciplines/benefits/Pages/default.aspx> (last visited on Oct. 31, 2013).

311. Kaufman, *supra* note 47, at 107 (“The HR function has also grown in importance over the last three decades because of the plethora of newly enacted federal and state employment laws [including ERISA].”).

312. DANA SHILLING, *THE COMPLETE GUIDE TO HUMAN RESOURCES AND THE LAW* 201 (1998).

313. *Id.* at 202 (“ERISA gives employers a choice. There is no requirement that an employer maintain any pension plan at all.”).

ERISA has a unique and somewhat paradoxical structure. On the one hand, employers generally have significant freedom in choosing whether to set up a plan, as well as in modifying a plan's contributions or benefits across the board.³¹⁴ Once established, however, the plan must be administered for the ultimate good of the beneficiaries.³¹⁵ The employer—switching hats, as in trust law, from settlor to trustee—must shift from negotiating with its employees to managing the plan in their interest. It is not always clear when the roles change, or what we expect from employers in playing these roles.

Although most of us would likely look at an ERISA case through the eyes of the beneficiary, the Roberts Court has evinced sympathy for the HR side of the equation. And as the Court makes clear, it has doctrinal and instrumental reasons for doing so. Its decisions in this area may have some elements of conservative, pro-business, and/or anti-litigation approaches. However, once again, the most consistent theme is that of protection for and empathy towards HR departments. The Court believes that businesses must govern themselves in the area, and it wants to provide HR departments with the means and independence to do so.

The foundational Rehnquist Court case for the Roberts Court's ERISA jurisprudence is *Firestone Tire & Rubber Co. v. Bruch*.³¹⁶ The plaintiffs in *Firestone* had been working for Firestone until their workplaces were sold to Occidental Petroleum.³¹⁷ They believed they were entitled to termination pay under the Firestone termination pay plan.³¹⁸ Firestone disagreed and refused to pay out any benefits. The plaintiffs brought suit challenging the denial of benefits under ERISA section 502(a)(1).³¹⁹ The review of ERISA benefit determinations is no small matter: an estimated 1.9 million beneficiaries have claims denied each year.³²⁰ The Court, in a unanimous ruling, held that Firestone's denial had to be reviewed under a *de novo* standard.³²¹ The Court's opinion may initially read as a pro-plaintiff opinion, or at least not as a pro-defendant one. The Court emphasizes the importance of viewing ERISA plans as trusts, and thus employees as beneficiaries.³²² It rejects Firestone's argument for an arbitrary and

314. *Id.* at 252–53 (explaining how a benefit plan can be modified).

315. *Id.* at 227 (“ERISA fiduciaries have a special duty: they must administer the plan exclusively in the interests of the plan’s participants and their beneficiaries.”).

316. 489 U.S. 101 (1989).

317. *Id.* at 105.

318. This plan, unbeknownst to Firestone at the time, was an ERISA-covered plan. *Id.*

319. 29 U.S.C. § 1132(a)(1) (2012).

320. *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 116 (2008) (citing CAROLE R. GRENZ ET AL., A FLOOD OF LITIGATION? 8 (1999), available at http://www.rand.org/pubs/issue_papers/2006/IP184.pdf).

321. *Firestone*, 489 U.S. at 115.

322. *Id.* at 110 (“ERISA’s legislative history confirms that the Act’s fiduciary responsibility provisions codify and make applicable to ERISA fiduciaries certain principles developed in the

capricious standard of review, finding that such a “reading of ERISA would require us to impose a standard of review that would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted.”³²³ However, the Court’s holding ultimately paved the way for employers to do exactly that. The Court stated: “we hold that a denial of benefits challenged under [29 U.S.C.] § 1132(a)(1)(B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.”³²⁴ That “unless,” of course, was fairly easy for employers to add to their plans. As a result, arbitrary and capricious review is available to any employer that wants it.

The Court’s opinion in *Firestone* is somewhat mixed about the need to protect employers from judicial oversight. Although the Court imposed default *de novo* review, it recognized that “[n]either general principles of trust law nor a concern for impartial decisionmaking, however, forecloses parties from agreeing upon a narrower standard of review.”³²⁵ The Roberts Court, however, has had no such ambivalence. As discussed below, the Court has consistently found in favor of greater HR discretion and authority. Sometimes that means cutting back on beneficiaries’ litigation rights. But sometimes, as in the *Crawford* case, it means providing for more relief in order to solidify the private administrative structure that the Court is endeavoring to maintain.

*Metropolitan Life Ins. Co. v. Glenn*³²⁶ follows in the tradition of *Firestone* as an opinion more infused with pro-beneficiary rhetoric than it actually calls for. At issue in the case was whether there was a conflict of interest when a plan administrator is also the payer of benefits and, if so, the effect of that conflict. The majority opinion, written by Justice Breyer, found that the roles of decider and payer do, in fact, create a conflict of interest at both insurance companies as well as employers.³²⁷ The Court also decided that this conflict of interest was to be taken into account, but only as only as one of myriad factors, in determining whether to uphold the denial of benefits under a deferential “arbitrary and capricious” standard.³²⁸ In so ruling, the Court declined to automatically displace the plan’s deferential standard with *Firestone*’s *de novo* default when a conflict of interest presents—as long as plan terms, as here, required deferential

evolution of the law of trusts.”) (citations omitted); *id.* at 111 (“In determining the appropriate standard of review for actions under § 1132(a)(1)(B), we are guided by principles of trust law.”).

323. *Id.* at 113–14.

324. *Id.* at 115.

325. *Id.* at 114–15.

326. 554 U.S. 105 (2008).

327. *Id.* at 108.

328. *Id.* at 116–17.

review. *Metropolitan Life* has become more important for its retention of the abuse of discretion standard in the face of a conflict of interest, rather than for the fact that it takes that conflict into account in some way.

The facts in *Metropolitan Life* engender a fair amount of sympathy for the plaintiff. After being diagnosed with a severe heart condition, she sought to avail herself of disability protections afforded by the employer as well as the government.³²⁹ The insurance company that administered the plaintiff's employer's plan gave her benefits for the initial 24 months after she was rendered unable to work.³³⁰ It also encouraged her to seek social security benefits.³³¹ After she obtained those benefits, the insurance company claimed the award as a set-off for their plan expenses.³³² But it then denied her claim for long-term disability benefits, even though the standard was close to the social security standard.³³³

Given the insurance company's duplicitous behavior, as well as the inconsistencies in its defense of its decision, the case seemed ripe for an abuse of discretion finding. And ultimately, that judgment was upheld by the Court.³³⁴ The larger question, however, is whether the responsibility for paying out benefits creates a conflict of interest when that party also decides whether to grant benefits. The Court, in dicta, found a "clear" conflict of interest "where it is the employer that both funds the plan and evaluates the claims."³³⁵ Noting that reputational concerns might push a private insurance company into better behavior, the Court nevertheless found that the defendant had a conflict of interest. And it held that such a conflict should be taken into account when reviewing the decision pursuant to an ERISA claim.

The Court's decision was a favorable one to ERISA plaintiffs in some respects, as the concurrence by Chief Justice Roberts and the dissent by Justice Scalia make clear. These jurists would have opted for a more limited role for the court: Chief Justice Roberts "would instead consider the conflict of interest on review only where there is evidence that the benefits denial was motivated or affected by the administrator's conflict,"³³⁶ and Justice Scalia would have held that "a fiduciary with a conflict does not abuse its discretion unless the conflict *actually* and *improperly motivates*

329. *Id.* at 109.

330. *Id.*

331. *Id.*

332. *Id.*

333. *Id.*

334. *Id.* at 118.

335. *Id.* at 112. This conclusion drew a harsh critique from Justice Scalia in dissent, who argued that "I would not resolve this question until it has been presented and argued." *Id.* at 127 (Scalia, J., dissenting).

336. *Id.* at 120 (Roberts, C.J., concurring in part and concurring in the judgment).

the decision.”³³⁷ However, the decision is still favorable to ERISA administrators in that it maintains the abuse of discretion standard when included in plan terms—plan terms, of course, drafted by plan administrators or HR departments. Changing the standard of review would result in “adopting a rule that in practice could bring about near universal review by judges *de novo*—*i.e.*, without deference—of the lion’s share of ERISA plan claims denials.”³³⁸ Ultimately, the standard would be more important than whether an ambiguous conflict-of-interest “factor” was made part of the abuse of discretion test.

The *Metropolitan Life* opinion also demonstrates the majority’s awareness of its effects on HR decision-making, and it offers a set of suggestions by which ERISA plan administrators can reduce the importance of the conflict of interest factor. The Court stated:

The conflict of interest at issue here, for example, should prove more important (perhaps of great importance) where circumstances suggest a higher likelihood that it affected the benefits decision, including, but not limited to, cases where an insurance company administrator has a history of biased claims administration. . . . It should prove less important (perhaps to the vanishing point) where the administrator has taken active steps to reduce potential bias and to promote accuracy, for example, by walling off claims administrators from those interested in firm finances, or by imposing management checks that penalize inaccurate decisionmaking irrespective of whom the inaccuracy benefits.³³⁹

These guidelines are not quite a safe harbor, but the “vanishing point” language is suggestive of that. Ultimately, the Court wants ERISA plan administrators to manage their conflicts privately. Firewalls and internal controls are likely to insulate future administrators from concerns about their conflicts of interest, according to the Court. Like the *Faragher-Ellerth* affirmative defense, these suggestions provide a roadmap for employers and HR professionals in carrying out their compliance responsibilities.

The ramifications of *Firestone* and *Metropolitan Life* became clear in *Conkright v. Frommert*.³⁴⁰ The “abuse of discretion” standard, which *Firestone* made available and *Metropolitan Life* kept in place, became the centerpiece of the Court’s deference toward plan administrators.³⁴¹ That

337. *Id.* at 127–28 (Scalia, J., dissenting).

338. *Id.* at 116 (majority opinion).

339. *Id.* at 117 (citations omitted).

340. 559 U.S. 506 (2010).

341. *Id.* at 512 (“We expanded *Firestone*’s approach in *Metropolitan Life Ins. Co. v. Glenn* We held that, when the terms of a plan grant discretionary authority to the plan administrator, a deferential standard of review remains appropriate even in the face of a conflict.”).

deference is maintained even when the administrator has already demonstrated a flawed understanding of the plan and has used that understanding to harm beneficiaries.

The facts of *Conkright* are “exceedingly complicated,” according to the Court, “[a]s in many ERISA matters.”³⁴² The plaintiffs were Xerox employees who left the company in the 1980’s, received lump-sum distributions of retirement benefits, and were later rehired.³⁴³ They disputed how the pension plan accounted for that lump-sum distribution in calculating their benefits after they were rehired.³⁴⁴ The plan administrator created “phantom accounts” whereby it calculated the hypothetical growth that the lump-sum distributions would have experienced if they had stayed in the plans.³⁴⁵ The plaintiffs’ pension benefits were then reduced by that amount.³⁴⁶ Plaintiffs challenged this method of calculation, and the Court of Appeals ultimately found the method to be unreasonable.³⁴⁷ On remand, the plan administrator submitted an affidavit with another method of calculating the benefits.³⁴⁸ The district court did not give this suggestion any deference, and it instead developed its own method of calculating the impact of the lump-sum distributions on future benefits.³⁴⁹

The complexity of the facts obscures the equities of the case. In the majority’s telling, the plan administrator appears to be a good-faith actor, coming up with legitimate approaches that are ultimately ignored by the district court. And not only did the district court fashion its own approach, but its approach did not account for the time-value of money, instead reducing the plans by the nominal amount of the distributions.³⁵⁰ However, the dissent painted the “phantom account” approach as much more unreasonable. In an appendix to the opinion, the dissent explained how workers subject to the phantom account would have made significantly less than if they had simply been treated as new hires upon their return to Xerox.³⁵¹ Perhaps more damningly, the plan administrator never notified employees about the phantom account method, other than vague language mentioning an “offset” to their pensions.³⁵² Given the complexity of the

342. *Id.* at 509.

343. *Id.* at 510.

344. *Id.*

345. *Id.*

346. *Id.*

347. *Id.*

348. *Id.* at 510–11.

349. *Id.* at 511.

350. *See id.*

351. *Id.* at 538–41 (Breyer, J., dissenting) (appendix) (explaining how a hypothetical employee would get \$690 per year upon his return to Xerox using the phantom account method, while a new employee would get at least \$3,500 annually).

352. *Id.* at 525–26 (Breyer, J., dissenting).

decisions being made, this lack of notification is not reassuring as to the administrator's competence or good faith.

The majority opinion does not spend as much time on the facts as the dissent, nor does it mention the administrator's failure to notify beneficiaries about the phantom account method. Instead, it focuses on the need for deference to plan administrators, even in light of error. In fact, the majority is remarkably empathetic to the administrators, as the opening of the opinion makes clear:

People make mistakes. Even administrators of ERISA plans. That should come as no surprise, given that the Employee Retirement Income Security Act of 1974 is an enormously complex and detailed statute, and the plans that administrators must construe can be lengthy and complicated. (The one at issue here runs to 81 pages, with 139 sections.) We held in *Firestone Tire & Rubber Co. v. Bruch* that an ERISA plan administrator with discretionary authority to interpret a plan is entitled to deference in exercising that discretion. The question here is whether a single honest mistake in plan interpretation justifies stripping the administrator of that deference for subsequent related interpretations of the plan. We hold that it does not.³⁵³

The focus on “mistake” here is critical: it is not, in the Court's telling, as if the administrator intentionally tried to misread the plan and deny benefits to employees. A “single honest mistake,” the Court reasons, seems fairly excusable and understandable.³⁵⁴

The Court is setting up a picture of plan administrators as neutral arbiters who act in good faith and have the interests of beneficiaries at heart. And before we dismiss such a view as naïve or even disingenuous, it is worthwhile to linger on it for a moment. As the Court points out, “Congress enacted ERISA to ensure that employees would receive the benefits they had earned, but Congress did not require employers to establish benefit plans in the first place.”³⁵⁵ Enforcement of employees' rights must be balanced against “the encouragement of the creation of such plans.”³⁵⁶ Part of the encouragement, it would seem, is a great deal of deference to the administrator in interpreting the plan. ERISA plans are not interpreted like contracts, in which the intent of the parties is parsed through the written and oral manifestations of their agreement. Instead, one side is given deference in its interpretation of the contract. To counterbalance this

353. *Id.* at 509 (majority opinion) (citations and quotations omitted).

354. *Id.*

355. *Id.* at 516.

356. *Id.* at 517.

deference, the administrator is expected to act like a trustee, rather than a party to a contract.

This expectation of trustee selflessness has always seemed a bit untenable, or at least unnatural, and the Court evinces some desire to move beyond it. The majority and the dissent spar over how trust law should shape the level of deference afforded to the administrator after an erroneous interpretation of the plan. The majority claims that trust law is “unclear” on the issue, but cites to a set of fairly aged cases to support the possibility of deference.³⁵⁷ The dissent, on the other hand, claims the law clearly does not require deference after an abuse of discretion, and it cites to the Restatement of Trusts and two treatises for support and then deconstructs the majority’s cases.³⁵⁸ The majority seems to acknowledge the flaws in its doctrinal argument by stating: “[w]hile we are guided by principles of trust law in ERISA cases, we have recognized before that trust law does not tell the entire story. Here trust law does not resolve the specific issue before us, but the guiding principles we have identified underlying ERISA do.”³⁵⁹ And it is in its description of the “guiding principles . . . underlying ERISA” that the Court’s attachment to human resources comes through.

The Court cites to the values of efficiency, predictability, and uniformity as the core principles in its exegesis of ERISA.³⁶⁰ Deference to the administrator’s interpretation promotes efficiency “by encouraging resolution of benefits disputes through internal administrative proceedings rather than costly litigation.”³⁶¹ Such deference also provides predictability, as “an employer can rely on the expertise of the plan administrator rather than worry about unexpected and inaccurate plan interpretations that might result from *de novo* judicial review.”³⁶² Finally, deference encourages uniformity by “helping to avoid a patchwork of different interpretations of a plan, like the one here, that covers employees in different jurisdictions—a result that would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them.”³⁶³ The Court pointed to the district court’s ruling in *Conkright* as an example of what could happen if deference were not afforded. The lower court settled on an interpretation that did not account for the time value of money,

357. *Id.* at 514 n.1 (citing *Hanford v. Clancy*, 183 A. 271, 272–73 (N.H. 1936); *In re Sullivan’s Will*, 12 N.W.2d 148, 150–51 (Neb. 1943); *Eaton v. Eaton*, 132 A. 10, 11 (N.H. 1926); *In re Marre’s Estate*, 114 P.2d 586, 590–91 (Cal. 1941); *Finch v. Wachovia Bank & Trust Co.*, 577 S.E.2d 306, 310 (N.C. Ct. App. 2003)).

358. *Id.* at 528–38 (Breyer, J., dissenting).

359. *Id.* at 516 (majority opinion).

360. *Id.* at 517.

361. *Id.*

362. *Id.*

363. *Id.* (quotations and citations omitted).

was different than interpretations of the same plan in other circuits, and fomented continued litigation.³⁶⁴ Deference, on the other hand, would leave the plan's reins in the hands of the administrator, absent bad faith or severe incompetence.³⁶⁵

Conkright illuminates the Court's core premise that runs, somewhat hidden, through *Firestone* and *Metropolitan Life*: namely, ERISA administrators must be given deference. This deference has its limits, however. In *Cigna Corp. v. Amara*,³⁶⁶ the Court upheld the lower court's equitable powers to reform a benefit plan based on erroneous disclosures to plan participants.³⁶⁷ There seems little debate that the plan's disclosure fell short of the requirements to notify participants of changes, particularly any decreases in their benefits.³⁶⁸ Importantly, the Court's decision limits the plaintiffs to injunctive relief under the statute; in contrast to monetary damages, injunctive relief attempts to change the problematic dynamics of the plan for the future.³⁶⁹ Moreover, the Court rejected the Solicitor General's effort to characterize the summary documents disseminated about the plan as the plan's terms themselves.³⁷⁰ Inherent in this distinction was the differentiation between the plan sponsor and plan administrator. The sponsor created the plan, while the administrator managed plan.³⁷¹ The Court was careful to reserve a limited role to HR in administering the plan; such a limited role allows the employer to delegate the management of the plan to HR without fear that HR will abruptly (and/or mistakenly) change the terms.³⁷² Nevertheless, the ultimate holding—that reformation of the plan was proper—shows that there are limits to the deference the Roberts Court is willing to give.

A final note on *Hardt v. Reliance Standard Life Ins. Co.*³⁷³ and *LaRue v. DeWolff, Boberg & Associates, Inc.*,³⁷⁴ both minor cases, unanimous in their judgment, in which the Court attended to the edges of ERISA's regulatory scheme. In *Hardt*, the plaintiff brought an ERISA action against her plan administrator for her long-term disability benefits. The district court dismissed both sides' motions for summary judgment, but the court

364. *Id.* at 517–21.

365. *Id.* at 521 (“Multiple erroneous interpretations of the same plan provision, even if issued in good faith, might well support a finding that a plan administrator is too incompetent to exercise his discretion fairly . . .”).

366. 131 S. Ct. 1866 (2011).

367. *Id.* at 1871.

368. *Id.* at 1872–74.

369. *Id.* at 1879.

370. *Id.* at 1877–78; 29 U.S.C. § 1132(a)(1)(B) (2012).

371. *Cigna*, 131 S. Ct. at 1877.

372. *Id.* at 1877–78.

373. 130 S. Ct. 2149 (2010).

374. 552 U.S. 248 (2008).

also indicated that it was “inclined to rule” in favor of the plaintiff and gave the administrator thirty days to reconsider its decision.³⁷⁵ After the administrator changed its decision, the plaintiff petitioned the court for attorneys’ fees. The Supreme Court held that under ERISA’s attorneys’ fees provision, the fee claimant need not be a prevailing party to be eligible for attorneys’ fees.³⁷⁶ Instead, the claimant must show some degree of success on the merits before a court may award attorney fees under ERISA’s general fee-shifting statute.³⁷⁷ Further, in *LaRue*, an employee sued his former employer alleging that it had not properly followed his instructions as to his § 401(k) retirement savings plan.³⁷⁸ The lower courts dismissed the claim, asserting that beneficiaries are only entitled to sue for damages as to the “entire plan.”³⁷⁹ The Court reversed, holding that a § 401(k) account should be treated as an “entire plan” and therefore the plaintiff was entitled to damages.³⁸⁰

We should not make too much of these cases. But in both situations, the Court overturned a court of appeal’s decision and ruled in favor of the plaintiff. To that extent, they represent counterexamples to the arguments that the Roberts Court is simply conservative, pro-business, or anti-litigation. More importantly, they represent HR values as well. *Hardt* reflects the desire to award parties who succeed, without requiring the technicality of a formal judgment (and thus further litigation). *LaRue* shows that the Court understands the new dynamics of pension plans, which favor defined contribution plans over defined benefit plans. By attending to minor ERISA issues with care and a concern for the underlying process, the Court demonstrates its care and concern for ERISA and the activities that it regulates.

III.

THE ROBERTS COURT AND THE HUMAN RESOURCES REVOLUTION

In *The Political Constitution of Criminal Justice*,³⁸¹ William Stuntz blamed the constitutionalization of criminal procedure for our dysfunctional criminal law. According to Stuntz, “[c]urrent constitutional law makes the politics of criminal justice worse: more punitive, more racist, and less protective of individual liberty.”³⁸² This counterintuitive result, claimed

375. *Hardt*, 130 S. Ct. at 2154.

376. *Id.* at 2152.

377. *Id.*

378. *LaRue*, 552 U.S. at 251.

379. *Id.* at 250.

380. *Id.* at 256.

381. Stuntz, *supra* note 21.

382. *Id.* at 785; *see also id.* at 784 (“There is no way to run a test, but it seems likely that because of the constitutional rules that govern policing and trial procedure, criminal law is broader, sentencing

Stuntz, stemmed from the political economy of the criminal justice system. Legislators and agencies only want to spend in areas where they can also exercise control. While the Court has extensively regulated policing and the trial process through constitutional interpretation, it has left substantive criminal law and sentencing largely free from oversight.³⁸³ As a result, legislators have focused their attention and spending in defining new crimes and meting out punishment. In order to remedy this state of affairs, Stuntz argued, the Court should roll back its criminal procedure regulation in order to let states take more control.³⁸⁴ It should instead focus on limited areas of constitutional concern that are likely to fester, and allow states to experiment with different solutions in all areas of the criminal justice system.³⁸⁵ Speaking more directly to progressive criminal law scholars, Eric Miller has also called for a reconsideration of the Warren Court's criminal cases.³⁸⁶ According to Miller, the traditional interpretation of the Court's criminal procedure jurisprudence has focused too much on rights, and not enough on the regulation of police that such jurisprudence entailed.³⁸⁷ According to his argument, instead of focusing on rights, progressives needed to focus on the regulation of law enforcement officers. Reconceiving the constitutional oversight of justice as an endeavor in republican governance, rather than a right-based scheme, would help reorient our perception to what really matters in everyday criminal justice: namely, the cops.³⁸⁸

Just as the political economy of criminal law has focused on constitutional rights, the political economy of employment law has focused almost exclusively on employee legal rights and the litigation that enforces them. The action in the employment law arena centers around statutory rights that are enforced by private rights of action. The gravamen behind these rights is the concern about employer abuses of power, whether through discriminating against certain kinds of employees, paying low wages, failing to provide for promised benefits, or preventing employees from taking sick or parental leave. However, the relationship between employer and employee is not solely oppositional; we need employers in

rules are harsher, key criminal justice institutions are more underfunded, and the population of arrestees and defendants is more racially skewed than would otherwise be the case.”)

383. *Id.* at 782. Stuntz acknowledged that regulation of sentencing has increased in the last few years. *Id.*

384. *Id.* at 832–33.

385. *Id.* at 831–50.

386. Miller, *supra* note 21, at 3–5.

387. *Id.* at 5–6.

388. *Id.* at 76–80.

order to have employees.³⁸⁹ In this way, just as we need governments to provide us with security against crime, we need employers to provide us with work and wages. In order to carry out their responsibilities, both governments and employers need power, authority, and flexibility. But we worry about them abusing their power. As a result, we have constructed rights-based regimes to protect those who suffer from abuses of power. In the criminal context, we have constitutional rights that protect individuals against abuses such as unreasonable searches and seizures. In the employment context, we have statutory rights as to hiring, firing, and other employment actions that protect individuals against abuses such as discriminatory terminations. These rights provide the oversight of the powerful institutions in question, and they provide remedies if an individual suffers abuse.

In both contexts, however, legal academia's focus on rights has arguably obscured the bigger picture. As Stuntz and Miller argue, the focus on constitutional rights constricted legislative and executive efforts to improve the overall functioning of the system.³⁹⁰ It has frozen certain aspects of criminal procedure in constitutional amber, and has left legislators to run amuck in other areas unfettered. We need to take a step back and look at the larger picture, they argue, particularly when it comes to the regulation of police. Miller contended that the Warren Court's "rights revolution" was actually all about regulation, and that a focus on rights missed the real point of the Court's criminal procedure jurisprudence.³⁹¹ Rather than creating rights, the Court instead introduced a federal regulatory regime into the realm of state and local policing. This regulatory regime has been overlooked by commentators in their focus on the contours of individual rights. Miller argued:

The central problem with left-liberal theories of policing is that they are too negative, providing no real account of good policing practices. Left-liberals are no more than minimally interested in the process of criminal investigation, because police investigation undermines immunity from state coercion. Instead, left-liberals focus on tightly restricting police discretion, which is usually characterized as, at most, one step away from race or class discrimination. Lacking a positive theory of policing, left-liberals surrender the discussion of police practices to centrists and conservatives. Left-liberals are left on the fringes seeking to reduce policing as a means of combating state repression.³⁹²

389. For a discussion of how the definition of employer is critical to defining who are employees, see Matthew T. Bodie, *Participation as a Theory of Employment*, 89 NOTRE DAME L. REV. (forthcoming 2013).

390. Stuntz, *supra* note 21, at 832; Miller, *supra* note 21, at 3–5.

391. Miller, *supra* note 21, at 4–5.

392. *Id.* at 76–77.

Stuntz made a similar claim. He argued that cops have been woefully underappreciated by legal academics in their efforts to improve the criminal justice system. He pointed to President Clinton's "100,000 cops on the street" legislation as the one truly successful recent criminal justice initiative,³⁹³ and he rued the lack of a federal "No Cop Left Behind" program.³⁹⁴ Stuntz's prescription is radical: "the best thing to do with the massive body of Fourth Amendment privacy regulation, together with the equally massive body of law on the scope and limits of the exclusionary rule, is to wipe it off the books."³⁹⁵ In exchange, the federal government should continue along the "100,000 cops" path to reinvigorate its relationship with local law enforcement.³⁹⁶ In other words: it's about the cops, stupid.

Who are the cops when it comes to the workplace? HR professionals.³⁹⁷ HR departments implement the employer's policies when it comes to hiring, firing, promotion, compensation, benefits, and work environment. Just as the police wield the authority in the criminal procedure context at the grass roots level, HR employees wield workplace authority on the shop floor. They make the particularized decisions—millions every day—that can lead to abuse and discrimination. And like the police, they can be demonized based on those abuses. But concern about that abuse overshadows their importance to the functioning of business and industry. More importantly, it neglects an opportunity. HR departments exist, at least in part, to make sure that the employer complies with labor and employment law. They are natural allies in the effort to fight workplace abuse and discrimination. Rather than seeing them as part of the problem, it is time to consider how they can be part of the solution.

Of course, HR professionals, like police officers, can engage in both misfeasance and malfeasance on behalf of their organizations. Critics of a compliance-based approach to employment law argue that HR departments are often deployed as managerial tools, rather than independent monitors.³⁹⁸ A common thread of these critiques is that HR programs may only serve as window dressing, or may even hide existing discrimination behind

393. Stuntz, *supra* note 21, at 810–11, 846 (noting it was combined with the enactment of 42 U.S.C. § 14141, which provides for broad injunctive relief against police departments if a pattern of constitutional violations are established).

394. *Id.* at 808–09.

395. *Id.* at 832.

396. *Id.* at 846.

397. LAZEAR, *supra* note 72, at 1 ("[Human resources professionals] are viewed as company police whose role is to create hassles for others in the firm.").

398. See, e.g., Susan Bisom-Rapp, *Discerning Form from Substance: Understanding Employer Litigation Prevention Strategies*, 3 EMP. RTS. & EMP. POL'Y J. 1, 5–7 (1999) (discussing employer compliance programs as, at least in part, "litigation prevention strategies"); Grossman, *supra* note 114, at 3–5 (expressing the concern that compliance regimes could ultimately leave the level of workplace sexual harassment unaffected).

particularly thick curtains.³⁹⁹ Under such circumstances, HR departments are part of the problem, rather than part of the solution, as they allow employers (and courts) to appear as if they are addressing workplace injustices, when in fact the problems are only submerged beneath a more palatable surface. HR may also make it harder for the employee to sue successfully, either by delaying the claim or creating a plausible paper trail for an innocent explanation.⁴⁰⁰

Suspicion of HR departments is natural and likely healthy. However, dismissal of such departments is a luxury that reformers cannot afford. The ability to vindicate rights and to obtain relief is critical to a toothy system of workplace justice. But given the low numbers of workers who formally exercise those rights within the judicial system,⁴⁰¹ it makes sense also to consider ways to protect employees through internal means. A recent trend in the theory of workplace regulation is self-governance or “new” governance.⁴⁰² New governance argues for greater cooperation between government officials, employers, and (sometimes) watchdog groups to leverage enforcement resources across a broader range of activity. These efforts, in a variety of fields, offer new methods for making sure that employers are following the law. It is puzzling that in the midst of the new governance discussions, HR professionals have been largely neglected.

Although HR may be dismissed as simply an arm of management, the field has an independent tradition as a profession and an academic field of

399. See Bisom-Rapp, *supra* note 79, at 964 (describing “how certain compliance mechanisms, specifically those recommended by defense attorneys, may obscure conditions of inequality”); Grossman, *supra* note 114, at 3 (criticizing the *Faragher/Elleerth* approach for “a misguided culture of compliance, one in which liability is measured not by whether employers successfully prevent harassment, but instead whether they comply with judicially created prophylactic rules”).

400. For example, Brake and Grossman argue:

The past decade’s surge of employer policies and procedures for resolving discrimination complaints internally plays an important role in contributing to the problems we identify. The channeling of discrimination complaints into internal employer processes intersects with both ends of the doctrine: the timely filing rules and the retaliation protections. By failing to toll the limitations period on formal remedies, participation in internal grievance processes can run out the clock on an unsuspecting employee’s formal assertion of rights. In addition, because employer nondiscrimination policies shape employees’ beliefs about the scope of discrimination law, and because participation in such processes falls under Title VII’s opposition clause instead of its more generous participation clause, employees who participate in such processes may find themselves without protection from retaliation if their perception of unlawful discrimination turns out to be false. Supporters of an expanded role for such internal processes have failed to consider the full costs of such measures, at least under existing doctrine. In the current Title VII rights-claiming framework, such measures risk supplanting, not merely supplementing, Title VII’s formal mechanisms for protecting substantive rights.

Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 934 (2008).

401. See Grossman, *supra* note 114, at 51–52 (discussing why employees often forego filing a formal complaint against workplace harassment).

402. See ESTLUND, *supra* note 16; Lobel, *supra* note 16.

study. Scholarship on HR has established large bodies of research on diversity programs,⁴⁰³ testing procedures,⁴⁰⁴ compensation mechanisms,⁴⁰⁵ and employee participation.⁴⁰⁶ There are many instances in the history of human resources in which HR professionals sought to improve the company's treatment of its workers and sought to adapt their businesses to changes in laws and social norms.⁴⁰⁷ By working on the front lines, HR professionals have the most direct impact on the day-to-day compliance of the corporation.⁴⁰⁸ Even skeptics recognize that HR can deliver important changes to workplace policies and culture—changes that may prevent wrongs from happening in the first place.⁴⁰⁹

How do we reconcile the potential benefits of HR with its potential hazards? To some extent, we cannot. HR must work with management to make the company profitable, but at the same time it must be able to restrain management in order to secure legal compliance and promote investments in human capital.⁴¹⁰ These polar attractions—the pull of management on one side, and legal and professional obligations on the other—are often found in the professional occupations.⁴¹¹ There are

403. See, e.g., Valerie E. Sessa et al., *Work Force Diversity: The Good, the Bad, and the Reality*, in HANDBOOK OF HUMAN RESOURCE MANAGEMENT 263 (Gerald R. Ferris et al. eds. 1995).

404. See, e.g., H. John Bernardin et al., *Performance Appraisal Design, Development, and Implementation*, in HANDBOOK OF HUMAN RESOURCE MANAGEMENT 462 (Gerald R. Ferris et al. eds. 1995).

405. See, e.g., Barry Gerhart et al., *Employee Compensation: Theory, Practice, and Evidence*, in HANDBOOK OF HUMAN RESOURCE MANAGEMENT 528 (Gerald R. Ferris et al. eds. 1995); Stephen E. Condrey et al., *Compensation: Choosing and Using the Best System for Your Organization*, in HUMAN RESOURCES MANAGEMENT: CONTEMPORARY ISSUES, CHALLENGES, AND OPPORTUNITIES 421 (Ronald R. Sims ed. 2007).

406. See, e.g., Robert C. Liden & Thomas W. Tewksbury, *Empowerment and Work Teams*, in HANDBOOK OF HUMAN RESOURCE MANAGEMENT 386 (Gerald R. Ferris et al. eds. 1995); Michael P. Leiter, *Engagement at Work: Issues for Measurement and Intervention*, in THE HUMAN RESOURCES REVOLUTION: WHY PUTTING PEOPLE FIRST MATTERS 213 (Ronald J. Burke & Cary L. Cooper eds., 2006).

407. See Jacoby, *supra* note 13, at 147 (arguing that HR professionals have found themselves “in relatively powerful positions” when outside forces such as labor shortages or new laws create uncertainty in the external environment); Bisom-Rapp, *supra* note 398, at 9–10 (“Responding opportunistically to the changing legal landscape, human resources managers began arguing in the 1970s that employers must upgrade personnel procedures.”).

408. See CHERRINGTON, *supra* note 12, at 8–11 (discussing the relationship between HR and line management); *id.* at 11–15 (reviewing the primary HR functions).

409. See Bisom-Rapp, *supra* note 398, at 11 (discussing research that the formal promotion mechanisms improved managerial perspectives on disadvantaged groups); Grossman, *supra* note 114, at 49 (discussing antiharassment training as “a worthwhile subject of study and probably a worthwhile pursuit for employers”).

410. See Jacoby, *supra* note 13, at 148 (discussing the “ambiguous role” played by HR within a company).

411. Many commentators raised serious concerns over the roles of professional gatekeepers in the wake of the Enron collapse. See, e.g., John C. Coffee, Jr., *Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms*, 84 B.U. L. Rev. 301, 302 (2004) (“Securities markets have long employed ‘gatekeepers’—independent professionals who pledge their reputational capital—to

particularly exacerbated in a youthful, less traditional profession such as HR.

The Supreme Court's opinions in this area, as this Article has explored, display solicitousness toward the HR perspective on workplace issues. Like HR more generally, this perspective is aligned with management. However, the Court has also recognized that for HR to be a viable entity within the firm, it must have its own center of gravity. Thus, the Court has been careful to provide for broad-based anti-retaliation protections, since retaliation strikes at the roots of the HR system. Similarly, in *Ricci*, the Court pushed for the HR professionals to stick to their guns, even when management wanted the flexibility to depart from the test.⁴¹² The Supreme Court has thus shown a willingness to promote HR ideals, rather than just managerial interests. This aspect of the Court's employment law jurisprudence is underappreciated.

Just as Miller argued that progressive criminal law scholars need a positive theory of policing,⁴¹³ progressive employment law academics and litigators need a positive theory of human resources. Such a theory would seek to mobilize a workforce almost a million strong to ensure not only that employers are following the law, but that workers are empowered to achieve their fullest potential. Fortunately, we need not start from scratch. Many HR academics have attempted to push the field more in the direction of employees⁴¹⁴ or more in the direction of an ethics-based practice.⁴¹⁵ The ultimate question for the field of human resources will be whether it has a primary commitment to management control and discretion over personnel matters, or whether it is primarily committed to the profession and its ethics. Legal scholars and practitioners will continue to play an important role in this debate.

CONCLUSION

The Roberts Court is only seven years old, but if past history is any guide, its impact on the law has only just begun. In the area of employment law, the Court has evinced an interest in and sympathy towards those

protect the interests of dispersed investors who cannot easily take collective action. . . . But during the late 1990s, these protections seemingly failed, and a unique concentration of financial scandals followed, all involving the common denominator of accounting irregularities.”).

412. See Part II.A *supra*.

413. Miller, *supra* note 21, at 76–77.

414. See, e.g., Graham & Tarbell, *supra* note 86, at 338 (advocating for a more employee-oriented approach to human resources).

415. The Society for Human Resources Management has a Code of Ethics that recognizes “As [human resource] professionals, we are ethically responsible for promoting and fostering fairness and justice for all employees and their organizations.” However, the Code also states: “As HR professionals, we are responsible for adding value to the organizations we serve and contributing to the ethical success of those organizations.” SOCIETY FOR HUMAN RESOURCES MANAGEMENT, *supra* note 84.

workers who toil in the fields of HR. Rather than writing off this effort as simply conservative, pro-business, or anti-litigation, commentators and advocates should reconsider the place of HR departments in the workplace. The opportunity exists to engage with these employees and harness their industry and efficiency for positive purposes. We should join the Court in these efforts.

